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Dissertation

THE AMERICAN CONSTITUTIONAL CONCEPTION  
OF MAJORITY AND MINORITY RIGHTS

by

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## CHAPTER I

### INTRODUCTION

This essay endeavors to make a scientific analysis of the American constitutional conception of majority and minority rights--not the author's conception of what they ought to be--and to reduce these conceptions to written form. It attempts to state specifically what is the nature of these rights--wherein they are identical; wherein they differ; when and where they begin and end.

It would be most difficult, if not impossible, to study rights without extending some consideration to the duties which attend their expression and exercise. Since attention is directed chiefly to the subject of rights, duties are treated only incidentally, or by implication. This is not to say, however, that, for example, the majority's right to select representatives or to determine policy in any particular instance is more important than its duty to exercise forbearance, moderation, and generosity in the enjoyment of these rights; or, that the minority's right to criticize or to appeal to "the people" is more important than its duty to submit willingly to the consequences of electoral defeat. In fact, the very eminent scholar Abbott Lawrence Lowell in his "Public Opinion and Popular Government" demonstrates that without the adequate exercise of both rights and duties by minority as well as by majority groups democracy cannot exist. Thus, in this sense, only part of the larger subject



of the rights and duties of American citizens is studied.

This essay is concerned with the rights of individuals as constituents of a membership association - the right to think and express thought - the right to express opinion with respect to approval or disapproval of concrete proposals for the solution of problems of common interest. It relates to a procedure agreed to in advance and made a part of the constitution. It carries with it the duty on the part of every constituent in this membership association to accept the decision when reached in pursuance of this procedure for the ascertainment of a consensus of opinion in the spirit of goodwill ; and the duty of each and all to cooperate in the execution of the decision so reached.

To the end that the demands of incisive analysis and concreteness of expression be fulfilled, this essay is limited in scope to the American system of laws. And the key words symbolizing the fundamental constitutional concepts are clearly defined at the outset so that the reader may labor under no misapprehension as to exactly what is the conception sought to be conveyed by this or that term.

The importance of this study requires no elaboration.



## CHAPTER II

### DEFINITIONS OF TERMS

#### A. The American Constitution

##### 1. Considerations Basic to the Interpretation of the American Constitution

"Despite its checks and balances, its conservative tone, and its emphasis on protection to the rights of property," says Munro, the Constitution of the United States "was nevertheless a landmark in the progress of democracy."<sup>(1)</sup> Whatever else this statement may mean, it shows that something more than the constitution itself must be considered before its full meaning and importance can be appreciated.

The community must be studied if its constitution is to be understood. "Nothing but a community can have a constitutional form of government, and if a nation has not become a community, it cannot have that sort of polity."<sup>(2)</sup> In other words, unless there is a group conscious of common interests, desiring organic unity for common purposes and therefore possessed of the impulse to find a means for self-expression, the persons within the group can form no common judgment, conceive no common end, contrive no common measures, and there would be no constitution.

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(1) W. B. Munro, GUS, 57. The abbreviations which are used throughout are explained in the bibliography.

(2) Wilson, CG in US, 25.



The people who live in the United States are a community. They have (a) a common consciousness of needs and purposes which occupy the center of their attention, (b) common beliefs--premises for reasoning and bases for judgment about the moral and juristic order, and about essentials to common welfare, (c) common sentiments--emotions or affective dispositions organized around objects of attachment and conscious objectives, and (d) common wills--determinations to realize purposes, to satisfy desires and to employ commonly accepted means to the ends sought to be attained. Because the people have sensed these environmental facts, they have discovered the existence of an empirical necessity for the recognition of the mutuality of their experiences and interests. This circumstance has given birth to a kind of faith between them. It is a faith which sustains democracy: a "faith in human values, individual and social, not in the accomplishment of specific results".<sup>(1)</sup> It precedes and is consequent to a politically-homogeneous population's sympathy with the institutions of government.

It presupposes a public which is intrinsically law abiding.... It presupposes a people which for the most part will conform to the rules of law.... It presupposes a public which in the jury box may be relied upon to enforce law and vindicate justice between man and man intelligently and steadfastly.<sup>(2)</sup>

It is a faith in the reasonableness of men and in the

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(1) Croly, PD, 170.

(2) Pound, SCL, 123.



common desire for goodwill.

The rule of reason is not dependent on the reasonableness of the rule, but upon the reasonable application of the rule. Insofar as rules are reasonably applied, their rationality is to a decisive extent the result of the goodwill of the judges.... (1)

The American people have recognized that this mutual good-faith and goodwill makes possible the realization of the principle of self-determination. Desiring that each member of the community be accorded the greatest possible scope of self-expression and self-determination, recognizing the value of the individual person's experience and the wisdom of making the multifarious experiences contribute to the welfare of the whole community, and realizing that the greatest efficiency in social action is obtainable by promoting, maintaining and conserving the goodwill of the constituent members of the community, democracy came to be accepted as the American community's philosophy of life. This philosophy is a social ideal which conceives of the nation, the state, even the community as means to the end that the individual person may have a fuller life than he might have had without it.

Our country was conceived in the theory of local self-government.... It is the foundation principle of our system of liberty. It makes the largest promise to the freedom and development of the individual. Its preservation is worth all the effort and all the sacrifice that it may cost. (2)

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(1) Croly, PD, 180.

(2) Congressional Record, Rep. C. A. Plumley, Aug. 10, 1937, 11128.



Democracy is that philosophy of life which regards all  
(1) persons as equals: equal not only in rights, but also in responsibilities.

The people will continue ready ... to do something for themselves; to achieve their own greatness; to work out their own destiny.... We cannot look to government, we must look to ourselves.(2)

Thus, the theory of democracy was adopted as the plan for social action most likely to enable the individuals to achieve their "raison d'etre". Since, by treating all persons as equals, it accords to each the greatest possible scope of action (physical as well as mental), democracy is considered to be that way of life most likely to make possible to each person the greatest appreciation of the values and meaning of life itself.

What, then, is democracy?

a. The Concept--Democracy

Democracy has been defined, described, discussed, analyzed, criticised, inspected, respected, reviled, ridiculed, compared, contrasted, and idealized. It has been hailed as (3) the supreme achievement of civilized man and it has been (4) (5) indicted as the rule by the mediocre and the incompetent. It has been charged as being a tyrant--the tyranny of the

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(1) Ordronaux, C Leg US, 11.

(2) Cong Rec, ibid, p. 11127.

(3) In HUSA, I, 1-3, 602-613, George Bancroft asserts his belief that democracy is the ultimate form of government and that its operation automatically brings the nearest approximation to societal perfection.

(4) R. A. Cram, NM, 22.

(5) Faguet, DR, chapters 1-3. See also Faguet's CI



majority; and it has been proclaimed as the great liberator of the oppressed--the oppressed masses and/or the oppressed minorities, whichever the occasion warrants. Democracy has  
<sup>(1)</sup> been characterized as majority rule ; and it has been  
canonized into a Political Credo with its articles of faith.  
<sup>(2)</sup> It has also been depicted as a form of government.

Democracy is neither a form of government, a form of the state, a form of society, nor any other form. England with its Monarch, Switzerland with its collegial type of executive, and the United States with its President could not all be properly characterized as democracies if the test was predicated on the form of prevailing institutions. Democracy is not a matter of form.

Democracy is that ideal social process in which all persons, as members of the sovereign body, work out together the mode of conciliating their individual activities with  
<sup>(5)</sup> the social good. It is based on the belief and principle that the masses of men, having free opportunity to work out

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(1) Elliott, AGMR, III. Bryce, MD, I, 20.

(2) Maine, PG, 6, 59, 76. Bryce, MD, I, 23-26. cf also, PC.

(3) Training Teachers for Americanization, J. J. Mahoney, Government Printing Office, Washington, D.C., 1920, p. 13; Lessons for Citizenship Training on Basic Principles of the Government of the United States, Mary L. Guyton, Massachusetts Department of Education, Boston, 1938.

(4) Giddings in DE, 199-214 and ES, 314-315 undertakes to establish that democracy may be any of these forms or a combination of them.

(5) Dewey, ED.



their own destiny, can, in the end, satisfy their actual  
(1) needs. In this government of, by, and for the people, in which group policy is ultimately determined by the will of the whole people, the participation of each person in the various phases of group activity is free from such artificial restrictions as are not indispensable to the most efficient functionings of the community. Thus, it is apparent, that the essence of democracy is the social process--not the formal institutions. Democracy is a way of arriving at decisions which will be binding on all the members of the community when the time comes to act. It is a prescription for social behavior by which all the people rule and are ruled. This conception of democracy is held by such authorities as Elihu Root, Jeremiah Jenks and Woodrow Wilson.

The question is sometimes asked whether a government elected by a majority of the people does not represent the majority and also the minority....the fundamental intention in any election is not to favor this or that man....it is rather....a means of finding out what the majority want. When the will of the majority is known, all the people, members of the minority as well as of the majority, want that will carried out. So the President or the Governor is the President or Governor, not of one party, but of the entire people, whose fundamental principle of government is that the will of the majority is to rule.... Democratic government has been a success only in those states where the minority has been ready to accept the will of the majority as that of the state and to join with the majority in the enforcement of law. (2)

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(1) Merriam, PTRT, "Chap" on Meaning of Democracy.  
(2) Jenks, PP, 12.



The declaration of war between the United States and Germany completely changed the relations of all the inhabitants of this country to the subject of peace and war. Before the declaration everybody had a right to discuss in private and in public the question whether the United States should carry on war against Germany.... Everyone holding these views had a right by expressing them to seek to influence public opinion and to affect the action of the President and the Congress.... But the question of peace or war has been decided.... When such a decision has been made ....it becomes the duty (of all the people) to act, to proceed immediately to do everything in their power to succeed in the war upon which the country has entered.... A democracy, which cannot accept its own decisions, made in accordance with its own laws, but must keep on endlessly discussing the questions already decided, has failed in the fundamental requirements of self-government.... (1)

Democracy means first of all that we can govern ourselves. If our men have not self-control then they are not capable of democratic government.... We must not only take common counsel but we must yield to and obey common counsel.(2)

Democracy may be defined as a politically-organized society the members of which undertake to accept, for the purposes of control, the deliberate judgment of some predetermined number of its constituent membership --a majority, a plurality, or, sometimes, nothing less than 100% of all participants.

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(1) Gaus, DT, "The Duties of the Citizen," Elihu Root, 163-181.

(2) Gaus, DT, "What Democracy Means," Woodrow Wilson, 182-193.

(3) Cleveland and Buck, BRG, 6.



b. The Concept--The United States of America

"Population has destroyed pure democracy....the New England town meeting is unsuited to larger bodies of men.

Hence, the growth of government by selected representatives.

Originally this form of government was intended to exclude any element of democracy or direct action by the people. The selected representatives were selected for the very reason that the electors selecting them trusted their judgment....

Gradually, however, the demos asserted itself.... The independent judgment of the representatives became mixed with an element of consultation with the represented..."

(1)

Since consultation is a conscious process, this necessarily involves the exercise by "the people" of their discretion and judgment, which obviously entails the modification or curtailment of independent judgment by the representative. When this occurs, "the theory of representative government is departed from; (they) cease to be representatives and become mere delegates or agents automatically registering the decisions which the people have reached....this means that, as to instructed matters, discussion and debate in the legislative chambers

(2)

is without meaning or result."

The essence of American government is democratic, though it is a republic in form. Thus, the use of the term "republic" refers to the established institutional forms through

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(1) RCAVP, 12, statement by Judge Clark, U.S. District Court.

(2) Willoughby and Rogers, IPG, 174-175.



which democracy acts. There is abundant evidence to substantiate this proposition.

Perhaps the best evidence is the Preamble to the Constitution of the United States which states in clear and unmistakeable language that "We, the People of the United States....do ordain and establish this Constitution for the United States of America." In contrast to the Articles of Confederation which were submitted to the several states for adoption,<sup>(1)</sup> the Constitution of the United States was submitted directly to the people to be acted upon by conventions chosen by the people of the several States.<sup>(2)</sup> This is indirect democracy and to be distinguished from republicanism.

The people, in their collective and national capacity, established the present Constitution....in establishing it the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, declared with becoming dignity, "We the people of the United States.<sup>(3)</sup> do ordain and establish this Constitution."

To the Constitution of the United States the term Sovereignty is totally unknown. There is but one place where it could have been used with propriety. But even in that place it would not, perhaps, have comported with the delicacy of those who ordained and established that Constitution. They might have announced themselves SOVEREIGN people of the United States.<sup>(4)</sup>

(1) CUSA, 10.

(2) BUL, 447; CUSA, 226; Hawke v. Smith, 253 US 221, (1920).

(3) Opinion of Jay, C.J. in Chisholm v. Georgia, 2 Dallas 419, (1793).

(4) Ibid, opinion by Wilson, J; Tiedeman, UCUS, 38, "In the United States, the people ordained and established their constitution and they alone can alter or amend it and any act of legislatures which transcends the provisions of the Constitution is unconstitutional and void.." Fed, 321.



(1)

Chief Justice Marshall, in *McCullough v. Maryland* insisted that the Constitution was the creation of "the people" and not of any other body, however responsible it might be eventually to the people, when he said

The government proceeds directly from the people....their act was final. It required not the affirmation, and could not be negatived by the State governments. The Constitution when thus adopted....bound the States.

This conception that America is a democracy, that the people govern themselves either directly or through representatives (2) has been the accepted doctrine throughout the years. It is not the same doctrine as that which declares that the people elect representatives to govern them.

In 1920, the United States Supreme Court said, "The Constitution of the United States was ordained by the people, and when duly ratified it became the Constitution of the United States....the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State (3) and its people have assented." Thus it is plain that the Constitution proceeds from the entire people and not from

(1) 4 Wheaton 316, (1819).

(2) Cong Rec, Aug. 10, 1937, 11127. The American form of representative democracy is not a device for the removal of responsibility from the shoulders of the people, but on the contrary a method that inevitably places the responsibility there.

(3) *Hawke v. Smith*, 253 US 221; cf also, *Dillon v. Gloss*, 256 US 368, (1921)



the States; that the State legislatures or the State conventions, as the case may be, in ratifying an amendment to the Federal Constitution, act as the instrumentalities not of the people of the particular State, but of the people of the United States.

They exercise a National function and they must exercise it in the way prescribed by the entire people. (1)

In a representative democracy, the convention is the supreme law-making body.... It is the primary assembly of the people and the first expression of their organized sovereignty. It precedes the government in the order of its genesis, and ever remains superior to it. Hence it is the only body capable of making or amending the organic law of the land known as the constitution....a convention, as the basis of government, presupposes contract, which implies legal capacity and political equality between the parties in interest. (2)

Thus, there is ample justification for the proposition that although in many instances direct democracy is impossible, the democratic process persists; although its form has been considerably altered.

If democracy is direct participation by "the people" in the policy-determining procedures, republicanism is representative government, i.e., policy-determination by "the people" through their selected representatives, not policy determination for "the people" by their representatives. Thus, it is fair to consider the United States as a democracy and not as a "republic" in the sense that policy-determination would

(1) BUL, 482-483.

(2) Ordronaux, C Leg US, 13, 14, 23.



be performed largely by the selected representatives for the people.

c. The Concept--American Democracy, as Expressed in the Constitution

If democracy is conceived of as a principle of social conduct, then the Constitution should be thought of as a means by which such principle may become realized. The American Constitution bears that kinship to democracy as a violin does to a melody; it is the instrument upon which the philosophical melody is given concrete expression. The democratic melody calls for individual liberty of expression, religion, property and security against the tyranny of majorities acting under the pretext of law. The American Constitution gives vitality to these matters by safeguarding the rights  
(1) and liberties of the individual man.

The quality of these rights under the American Constitution may differ from the quality of the same rights under another constitution much as the quality of tone of the violin differs from that of the oboe or flute. What determined the character of American Constitutional democracy and the quality of the rights thereunder? H. L. Carson answered  
(2) this question when he said

The proper view is to regard the Constitution as the offspring of a mighty political gestation which had lasted for centuries.... Behind the Constitution there stood the Thirteen Articles of Confederation: behind these

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(1) Bloom, CSL, 1-3.

(2) Chandler, GBFC, Evolution of Representative Constitutional Government, 4-5.



the Constitutions of the original Thirteen States: behind these the Colonial Charters: behind these the Charters of English Trading companies: behind these the Charters of English cities, towns and boroughs and behind these the primitive institutions of the days of Alfred the Great.

The historical view regards the Constitution as an implement of the sovereign power for the keeping of that social order which results from the development of democratic community-life over a long period of time. This interpretation of the Constitution as a means of restraint with a view to giving efficacy to the social order is useful, if properly understood.

The American Constitution is the system by which "the people" abide so that they may live that brand of democracy which by training, environment and reason, they most desire.

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(1) Hadley, FR, 30. "Constitution serves much the same purpose in public law which a fence serves in the definition and protection of private rights to real estate. A fence does not make a boundary; it marks one."



## 2. The Constitution of the United States.

From the very beginning and until today there is to be found a very respectable and eminent group of authorities who emphasize the idea that the American Constitution is a written document. (1) The most commonly quoted statement affirming this proposition is that made by the Rt. Honorable William E. Gladstone, in 1887, when he said, "The Constitution was the most wonderful work ever struck off at a given time by the brain and purpose of man." (2) No less an authority than Howard Lee McBain said, in 1927 (3)

As for the American Constitution we may say for practical purposes that it is a document as amended and interpreted to date, which was drafted by a famous sitting in Philadelphia in the year 1787, which was ratified by conventions called for that purpose in the several States, and which went into effect in 1789.

- (1) Finer, TPMG, 120; McBain, LC, 13; Cleveland, UD, 295; The American Constitutional Method, Homer Cummings, p. 2; Young, NAGW, 11, "The government under the Articles (of Confederation) failed because it could not command the respect and obedience of the States.... After numerous attempts, Congress provided for a convention to meet at Philadelphia in May, 1787, to revise the Articles. This body...devised an entirely new Constitution. The new document was submitted to conventions in the States chosen by the voters...." See also, The Making of the Constitution, M. Farrand; History of American Political Theories, C.E. Merriam; American Commonwealth, James Bryce; An Economic Interpretation of the Constitution of the United States, C.A. Beard; Foundations of American Nationality, E.B. Greene; Cong Rec, Jan. 18, 1938, p. 1008 ff.
- (2) Quoted in Chandler, GBFC, 3; Corwin, COC, 85; cf. Bryce, MD.
- (3) McBain, LC, 11.



Herbert Croly, likewise, postulated in his thinking the thesis that the American Constitution is a written document and, therefore, a rigid constitution.

The United States Constitution really came to be a monarchy of the Word.<sup>(1)</sup>

The rigid and dogmatic element in the.... Constitution competes with democracy for the allegiance of the American political conscience.... The truth is that the American democracy rallied to an undemocratic Constitution.<sup>(2)</sup>

The eminent Frederic J. Stimson has asserted, and without equivocation, that the American Constitution is the "written will of the people".<sup>(3)</sup>

....when there is an Act of Congress or a State legislature on the one hand, and on the other the permanent will of the people expressed in a written constitution, and the two conflict, the courts have to choose which is the "law"; and that, of course, must be the higher law, their permanent written orders, and not the act of their representatives.... This latter is not really law at all; for under the American idea that cannot be law whether made by Congress or a State legislature or ordered by the President, officer, board or commission which clashes with the written will of the people.

Some publicists, insisting that the American Constitution is a written document, concede that one must go beyond the four corners of the instrument if he will understand it aright.

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(1) Croly, PD, 44.

(2) Croly, PD, 46-62.

(3) Stimson, ACPFR, 18-19.



Our American Constitutions are wholly written, with this qualification, that some of their principles are implied or assumed to be inherent in our form of government, although not expressed or at least affirmatively expressed by any written provision. (1)

And, too, the point of view is expressed that the American Constitution "is not a code of transient laws but a framework of government and an embodiment of fundamental principles." (2) As opposed to this point of view, there are those who agree with William B. Munro when he observes (3)

The Constitution of the United States, to use its own words, is "the supreme law of the land".... Yet the written constitution.... is shorter than the constitution of any other nation and shorter than any of the state constitutions. There are about 4000 words.... which can be read in half an hour....but these printed words do not by any means include the whole Constitution of the United States. They form only the basis, the starting point.... The architects of 1787 built only the basement. Their descendants have kept adding walls and windows, pillars and porches to make a rambling structure which is not yet finished. That is what the framers of the original constitution intended. It was not in their minds to work out a complete scheme for the government of their country.

Munro believes that the written constitution is not a framework of government embodying fundamental principles, but rather "the point of a finger in the direction of the rising sun"--an indication of the direction in which the people have agreed to go and a marker pointing out the paths which their

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(1) Baker, FLAC, I, 1.

(2) Mr. Rice's argument for the State of Rhode Island in the National Prohibition Cases, 253 US 350, 355 (1920).

(3) Munro, GUS, 61.



delegated authorities may not pursue.

Let us consider for a moment whether the American Constitution is or is not a written constitution.

It must be observed, first, that in addition to the United States Constitution--be it written or unwritten--there are 48 States, each with a State constitution. Therefore, the Constitution of the United States is not the only constitution by which the inhabitants of the country live. The United States Constitution recognized this fact in Articles IX and X of the Amendments thereto.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. (1)

The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people. (2)

Second, because when the term CONSTITUTION OF THE UNITED STATES is used it refers to 4000 word document and not to the State constitutions, it is both desirable and expedient to distinguish between the Constitution of the United States (3) and the American Constitution. The former refers directly to the Federal Constitution which, when adopted by the

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(1) Ninth Amendment.

(2) Tenth Amendment.

(3) Such a distinction is made by F.A. Cleveland, TGD, 179, where he points out that "The constitution of government in the United States (i.e. the American Constitution) after the adoption of the federal plan, stated in order of precedence, was made up as follows: (1) "The Constitution of the United States.." Cf also CUSA, 60, 62.



(1)

people, bound the States; it is the instrument which defines and limits the powers of the President, the Congress and the Judiciary; it tells these officers what they may do and what they may not do; it places interdictions upon the States; but nowhere does it require any citizen or any other person (not a properly delegated officer) to do anything. (2)

It is proper, therefore, to distinguish between the Federal Constitution (i.e., Constitution of the United States) and the American Constitution. The latter is all-inclusive; it comprehends all the constitutions (federal, State, local--written and/or unwritten) under which the people live.

Is the Constitution of the United States wholly written or is it partly written and partly unwritten? A moment's reflection on such phenomena as the President's Cabinet, the Congressional Committee System, the Judiciary's power to declare Congressional enactments unconstitutional leads one to the irresistible conclusion that there are many matters--which are integral parts of the Constitution of the United States--which are not stated within the four corners of the document, are not necessarily implied from the expressly delegated powers and which have never found sanction expressed by any "authoritative" pen, but which must be considered as part of the Constitution of the United

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(1) McCullough v. Maryland, 4 Wheaton 316 (1819); BUL, 448.  
(2) Cooley, CL, 37, "These instruments measure the powers of rulers, but they do not measure the rights of the governed....it grants no rights to the people."



(1)  
States.

Let us now turn to a consideration of--What is the nature of the American Constitution?

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- (1) Tiedemann, UCUS, 38-42, "Federal Constitution contains only a declaration of fundamental and most general principles of constitutional law, while the real constitution, its flesh and blood, is unwritten."



### 3. Essentials of the American Constitution

#### a. Constitutional as Distinguished from Other Law

Men always search for the guarantee of the fundamentals in their own civilization; and what is fundamental is necessarily construed in the light of the evolving civilization.

(1) Thus, because stability and change, settlement and flux are expected, men hover between these extremes and struggle for their fixture in constitutions. Human society does not wait for a constitution to be written. Whenever urgent matters present themselves, the society establishes "fundamentals", by laws or conventions, and those "fundamentals" which are not included within the written constitution are thus provided outside its pages. "The institutions created without (written) constitutional benediction may be

so imbedded in the vital desires of men as to be able to persist as fundamentals, even when the paper fundamentals  
(2)

are swept away...." American society has its fundamentals, and its constitution was established to safeguard these fundamentals. The theory devised to explain the institutions so established "is by no means always a final term, but like the constitutional law, too, is often simply instrumental of more ultimate ideas, points of view, values, or, to speak more definitely, is translative of the social  
(3)  
philosophies, outlooks and predilections...."

(1) Finer, TPMG, 157. "There are no fundamentals capable of standing proof against time, except entities so vague as to be meaningless."

(2) Op. cit.

(3) Corwin, COC, 95.



It is often remarked that the American Constitution is  
 (1) the supreme law of the land; and that ours is a govern-  
 (2) ment of laws and not of men.

Made for an agricultural community with a population of three and a half millions, the Constitution is today the basic law of the most highly industrialized community in the world, supporting a population of nearly one hundred and thirty millions.... Made for the age of the ox-cart and the sailing vessel, it still functions in an era of airplanes, motor cars, movies and radios. (3)

How marvelously farsighted and wonderfully omniscient our forefathers must have been! But think--are not men the producers and laws the products? What life or purpose would laws have if there were no men to interpret and enforce them?

....the 'living' body of law, this is mere metaphor. The life of the law is borrowed life. It is, like the life of man's other material and intellectual products, borrowed from the life of man. (4)

This is what Bagehot, Gladstone's contemporary, meant when he said, "....the men of Massachusetts could work any  
 (5)  
 Constitution."

(1) Munro, GUS, Chap. V; CUSA, 636; Corwin, COC, 100, "Once the Constitution was adopted it became the supreme law of those elements of the American population who had opposed it as well as of those who had urged it."

(2) Goodnow, PCG, 2.

(3) Ibid, 85.

(4) McBain, LC, 3; Dimock, MPA, 163.

(5) Quoted in COC, 85.



And so, when we say that the American Constitution provides for a "government of laws" and not for a "government of men", we must understand this as connoting a government in which the governed are told in advance what are to be the  
<sup>(1)</sup> rules of the game of living together.

By the process of formal revision and amendment as well  
<sup>(2)</sup> as by the very real process of informal development, the American Constitution has become the instrument which essays to guarantee the American democracy's "fundamentals" or rights by limiting the powers of the delegated authorities; it does not create rights. It is formless, dateless, and was not, as Gladstone said it was, "struck off by the mind  
<sup>(3)</sup> and heart of man".

#### b. The American Constitution--Its Inclusions

The American Constitution may be divided into three parts, according to the exercise of powers: (1) the Constitution of the United States, (2) the forty-eight State Constitutions, and (3) the sovereign powers of the people which were not delegated to the Federal Government but which were  
<sup>(4)</sup> withheld from the States.

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(1) McBain, LC, 4-6; @ page 272, "The Constitution....is no final cause. It is a human means."

(2) McBain, LC, 25.

(3) Ibid, 13.

(4) Tenth Amendment, U. S. Constitution.



Sixty-five powers are given to the Federal Government and seventy-nine are withheld, of which thirteen are denied both to that Government and the constituent States. Forty-three of the sixty-five powers given to the Federal Government are expressly denied to the States; while as to eighteen powers, the grant is concurrent. (1)

If a power is not enumerated it is not possessed by the Federal Government; if it is not excepted, it is possessed by the State. "The State governments have everything that is not conferred on the nation or specifically withheld; the United States Government nothing that is not specifically given" (2) or necessarily implied. The federal constitution and the constitutions of the forty-eight States, complementing each other, form only the basis of our system. (3) They were drawn up with ends in view that were almost the opposite of one another.

What our forefathers were afraid of in the Federal Government was an aristocratic or autocratic rule or a remote power which might come to interfere in their domestic affairs. Therefore, the influences which restrained and limited the Federal Constitution were democratic.... The State Constitutions.... were rather aimed at protecting the propertied classes from the omnipotent legislatures.... Therefore, the restrictions are imposed on the democratic legislatures in the interest of property or order. (4)

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(1) Beck, TCUS, 210; see also Stimson, ACPPR.

(2) Hare, ACL, I, 94-95.

(3) McBain, LC, 13.

(4) Stimson, ACPPR, 24.



In one instance democracy is encouraged, in another it is distrusted. Something more, therefore, is necessary to give direction and unity to these powers. That "something"  
(1) is the sovereign power which the people exercise. To-  
gether, these three repositories exercise all the powers under the American Constitution.

The American Constitution is both written and unwritten.  
(2) It is usually, and incorrectly, designated as a written constitution because it contains certain definite  
(3) written instruments. But it is as much, if not more, unwritten.

The great body of American Constitutional law is not found in the written documents popularly called our written constitution.  
(4)

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- (1) Mathews, ACS, 48; Beck, TCUS, 213; Read, CR, 3, "Fundamental Law Behind the Constitution of the United States," C.H. McIlwain, "the non-enumerated powers are more important practically than the enumerated...."
  - (2) Arneson, ECL, 7; Horwell, UAC, 1, Once upon a time some unknown humorist divided constitutions into written and unwritten, and since then text-book after text-book has taken his classification seriously....authors of our text-books, when they speak of written versus unwritten constitutions....are not employing "written" and "unwritten" in the vulgar significations of those words. According to their own account of the distinction, they use "written" as a convenient abbreviation of "recorded in a single document and placed out of reach of alteration by the legislature," while "unwritten" in the same code, signifies "composed of a variety of statutes, judicial decisions, and what not, and capable of being amended by ordinary legislative enactment, or even by the adoption of a new custom."
  - (3) Cleveland, TGD, 179.
  - (4) Tiedeman, UCUS, 45.



The American Constitution is comprised of the following:

1. The written charter entitled "The Constitution of the United States" together with the statutes and treaties made in pursuance thereof.
2. The written charters in the several States entitled "constitutions" insofar as they make provision for the structure and exercise of the powers of government.
3. The constitutional provisions of the statutes of the United States and State Governments within their several spheres.
  - a. Executive and administrative rules, orders, and opinions of federal officials acting under authority defined by the federal constitution.
  - b. The structural and organic provisions contained in statutes of the state governments, including the charters of municipalities, each operating within its own jurisdiction.
4. The constitutional rules of common law and judicial precedent.
5. The constitutional rules contained in customs, usages, (1) and conventions within and without the offices of government.
6. Local and municipal ordinances and administrative acts within the authority conferred by state governments.

It is also necessary to stress that the unwritten terms of the constitution are not only supplementary to the written words, but often modify, through exception and interpretation, and sometimes even supercede, the written documents. (2)

(1) MacIver, Soc, 17. "Mores are the folkways....regulators of behavior, not merely....ways of behaving. Every social usage is also in a degree a social control."

(2) "The liberty of contract and the right of private property which are protected by the limitations of the Constitution are held subject to the police power of government to pass and enforce laws for the protection of the public health, public morals and public safety." Root, AGC, 115.



The following factual circumstances are stated in support of the proposition (1) that the American Constitution is fundamentally unwritten, and (2) that the controlling indicia are not the words of the written documents, but rather the interpretations construed thereon in order to accord with the will of the people.

(A) The thesis that the powers of the Federal Government are powers expressly delegated or necessarily implied in the express delegation of other powers is considered to be elementary. Nowhere in that written delegation of powers is Congress authorized to purchase land. Yet, it is a reasonably logical implication from the conferred war powers that the Federal Government could subjugate hostile territory and continue to hold it, even after the cessation of hostilities, as a consequence of the proper exercise of its war power.

....the power of the United States to acquire territory and to govern it is an exercise of the war power. (2)

It is equally reasonable to assert that war powers may be properly exercised only in time of war. The purchase of Alaska did not occur under such circumstances; but it would be justified as a necessary step for national defense. How far away from the country can the Federal Government go in peace time in the prosecution of such steps for national

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(1) Tiedeman, UCUS, 142.

(2) American Insurance Co. v. Canter, 1 Pet. 511.



defense? The answer to this question is not found in the written words of the Constitution of the United States.

(B) The Constitution of the United States explicitly provides that "In case of the removal of the president from office, or of his death, resignation or inability to discharge the powers and duties of said office, the same shall devolve upon the vice-president...." Yet, whenever a vacancy occurs by reason of death, usage, and usage alone, transforms the vice-president into a president in such a contingency. On the other hand, when President Wilson went to Paris after the World War, despite the mails and telegraph, he was unable to perform adequately the duties of his office. This incapacity to perform the presidential duties because of distance from the Capitol led no one to suppose for a moment that Vice-President Marshall would become head of the nation, pro tem. Had he ever imagined such a situation, "Mr. Wilson's going to Europe would....never have taken place....and what happened at Versailles....would have happened otherwise."

(C) The written Constitution of the United States provides that the president shall "with the advise and consent of the senate----make treaties, provided two-thirds of the

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(1) Article II, sec. 1, cl. 6.

(2) Horwill, UAC, 58. "After August 2, 1923 everyone spoke of President Coolidge and no one of Vice-President Coolidge.... It is commonly believed he became President... this belief is entirely mistaken." Cf. Amendment XX, sec. 3 of U. S. Constitution.

(3) Ibid, 86.



senators present concur; and he shall nominate, and by and with the advise and consent of the senate, shall appoint all ....officers of the United States whose appointments are not herein otherwise provided for, and which shall be established

(1) by law." No advisory body other than the Senate is mentioned or suggested from the beginning to the end of the instrument. Although the consent of the Senate is still required for the ratification of treaties and for official appointments, from the very beginning the President has never met with the Senate in personal consultation, but has substituted therefor a Cabinet with which he does meet and confer.

With respect to making nominations for membership in the Supreme Court, and other important nominations and appointments, the President has never taken the Senate's advice on these matters but has conformed to party practice which ordains that he follow the advice of the senator or senators of his own party, if any, from the State in which the appointment is to be made.

(3) On entering the White House,

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(1) U.S. Constitution, Art. II, sec. II, cl. 2.

(2) Horwill, UAC, 101; Mathews, ACS, 147, Although the framers of the Constitution evidently intended by Art. II, sec. II, cl. 1 and 2 that there would be created executive departments from which the President might require opinions, "the cabinet as such is not recognized in the Constitution ....the Senate was expected to act as the President's advisory council." Corwin, CWMT, 56, "the principal officers....'of the executive departments' have, since Washington's day, composed the President's Cabinet, a body utterly unknown to the Constitution. They are invariably of the President's own party and loyalty to the President is an indispensable qualification....(there is nothing) to



Theodore Roosevelt declared this to be his policy

In the appointments I shall go on exactly as I did while I was Governor of New York. The Senators and Congressmen shall ordinarily name the men, but I shall name the standard, and the men have got to come up to it. (1)

It is the Senator, therefore, who makes the nomination, subject to the President's approval, before submission to (2) the Senate for its consent.

Furthermore, although the written constitution does not mention it, it has become settled constitutional practice that the whole membership of the Cabinet and of the Supreme Court shall not be drawn from any one state or even from one (3) section of the country. There is no attempt, however, to keep anything like an exact balance.

(4)

(D) The case of *In Re Neagle* further illustrates the proposition that Federal officers do have powers not specifically delegated nor necessarily implied from those powers in fact delegated by terms of the written constitution. In this case, Mr. Justice Field, a member of the United States Supreme Court, having rendered a judgment unfavorable to

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- (2) (continued from page 30) prevent the President from making his Cabinet up out of the chairmen of the principal committees of the House of Representatives.
  - (3) (from page 30) McBain, LC, 26.
  - (1) J.B. Bishop, "Theodore Roosevelt and his Time", 1920, Vol. 1, 157.
  - (2) McBain, LC, 26.
  - (3) Horwill, UAC, 183.
  - (4) 135 US 1, (1890).



one Terry, was threatened with violence by the latter while traveling on circuit in California. Under these circumstances, the President sent along deputy-marshal Neagle to act as bodyguard for the Justice. A short time thereafter, when Terry committed a murderous assault on the Justice, Neagle shot and killed the assailant. Upon being indicted for murder in the California State court, Neagle interposed as his defense the President's order. In upholding the President's right to issue such an order, the United States Supreme Court admitted there was no special act of Congress which authorized the President to furnish bodyguards to federal judges. Nevertheless, said the Court, an assault upon a Federal judge while in the discharge of his official duties is a breach of the peace of the United States as distinguished from the peace of the State in which the assault took place.

It is within the power and duty of the President to take measures for the protection of a Federal judge whenever there is just reason to believe he would be in personal danger while executing the duties of his office.<sup>(1)</sup>

(E) While the Constitution of the United States requires each House of Congress to "keep a journal of its proceedings and from time to time publish the same, excepting such parts as may in their judgment require secrecy,"<sup>(2)</sup> it does not impose upon either House the obligation to hold its sessions

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(1) Mathews, ACS, 147.

(2) Art. I, sec. 5, cl. 3.



in public. If the doors of either chamber were closed during debate, however, such behaviour would be regarded as a breach  
(1)  
of the unwritten constitution.

(F) Tradition, not the written constitution, prescribes  
(2)  
that a President may not be re-elected for a third term.  
Yet, actually our Constitution can be amended today (as it has been amended for the last 150 years) by process of interpretation.

New senses are given to old words; the growing political foot, by sheer pressure, changes the old stiff shoe.(3).

The United States Constitution does not prescribe any limit to the re-eligibility of the President. But, since Washington, in his Farewell Address, declined re-election on the ground that the safety of republican institutions demanded imposition of a limit to the President's re-eligibility, this principle has become accepted by the people and imbedded in our unwritten constitution to such an extent that it is indeed as effective as it might have been were it specifically incorporated in the written constitution. But, if in the future, a President <sup>would</sup> be elected for a third term, it would not be regarded as unconstitutional in the sense that he would be prevented from holding office. His election for a third term would be regarded as a repeal of

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(1) Horwill, UAC, 175.

(2) McBain, LC, 26.

(3) Weyl, TND, 109.



the constitutional rule previously enunciated.

This is an example of a limitation of the unwritten constitution, which finds no authority whatever in the written Constitution, and yet as long as public opinion does not undergo a change, it is as binding as any written limitation, and even more binding than some of the plainest directions of the written Constitution.(1)

(G) The written Constitution directs that for the election of President and Vice-President of the United States

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in Congress.(2)

The electors shall meet in their respective states, and vote by ballot for President and Vice-President....and shall make distinct lists of all persons voted for....and transmit to the seat of government of the United States, directed to the President of the Senate....(who) shall in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted....(3)

In no part of the written constitution is any reference made to political parties or is their use in any way contemplated. The real living constitutional rule for the selection of a President and a Vice-President is not that they be selected after deliberation by the electors, but, that they must be nominated by political parties and selected by a popular election, indirectly through the choice of the

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(1) Tiedeman, UCUS, 51-53.

(2) Art II, sec. I, cl. 2.

(3) Amendment XII.



(1)

electors of one party or of the other.

The Constitution decrees that the President shall be chosen by groups of electors in the several states.... But political parties early decreed otherwise. Candidates are nominated by parties and electors chosen thereafter merely rubberstamp these nominations. The form remains; the substance has long since passed into limbo. (2)

(H) The first amendment to the Federal Constitution provides, among other things, that Congress shall pass no laws prohibiting the free exercise of religion. But the Supreme Court has held that Congress may abridge religious practices of the Mormons insofar as they provide for polygamy, (3) because polygamy was made a crime by Congressional enactment and the exercise of any rights under the Bill of Rights must be held to be subordinate to the police power.

A vested interest cannot because of conditions once obtaining be asserted against the proper exercise of the police power. (4)

The police power of the State cannot be abdicated nor bargained away. (5)

Thus, the exceptions to the written constitution which

(1) Tiedeman, UCUS, 49; Horwell, UAC, 210.

(2) McBain, LC, 25-26.

(3) Davis v. Beason, 133 US 333, 342, (1890). "Polygamy is a crime by the laws of all civilized and Christian countries; to call the advocacy of it a tenet of religion is to offend the common sense of mankind." Watson v. Jones, 13 Wallace 679; Reynolds v. United States, 98 US 145; New v. United States, 245 Fed 710, (1917).

(4) Hadacheck v. Sebastian, 239 US 394, (1915).

(5) Chicago, etc. R. Co. v. Tranbarger, 238 US 67, (1915).



existed at common law still exist and must be construed as  
(1)  
being in force as though they were also written.

The unwritten portion of the American Constitution is not confined to the unwritten exceptions and the necessary elaborations on the written constitutions. There are many parts to the American Constitution which are unwritten, in the sense that they were either not conceived or not considered within the written documents. These parts of the Constitution can be understood only in terms of the customs, usages, conventions and the common law.

Emlin McClain argues that if the written constitutions do not express the will of the people with reference to the distribution and limitation of the powers of government,  
(2)

then we have no authoritative constitution. The written constitutions do in fact express the will of the people; but since there are many matters upon which the people have not expressed their will in writing, it does not follow that they have no will or do not express it otherwise.

McClain's argument postulates the very proposition which he sets out to prove, i.e., that the constitution is written, therefore, if the will of the people is not written, there can be no constitutional provision expressing their will.

Again he argues

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(1) CUSA, 589-1011.

(2) McLain, CLUS, 14.



An example of what purports to be part of our unwritten constitution is that no president shall be elected for more than two consecutive terms.... But it is evident that these so-called rules are no part of our constitutional law...no one would pretend if such limitation were ignored and a president nominated and elected for a third term that he was not lawfully president of the United States and have all the authority of president. No Congress or Court would venture to say that his election was for that reason invalid....

This argument would be valid if its premises were sound. If in fact it were true that the Constitution were wholly written, then, of course, it is reasonable to assert that it could not be amended except as provided. But, the argument begs the question, again, by assuming that conclusion. If the constitution is also unwritten in part, then why cannot that part be amended in ways other than those indicated within the limits of the written documents? The answer is--they can.

Any such general rules and principles, though they may be said in some sense to be a part of the unwritten constitution under our form of government, are not of equal authority with the provisions of our written constitutions and are not in a legal sense limitations on the powers of government.(1)

Here again McClain's argument reduces itself to the proposition, not that the unwritten part of the constitution is not constitution, but that one part of the constitution is more important than the other--a suggestion of dubious quality. He also suggests that the constitution is really

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(1) McClain, 10, 15-16.



"in a legal sense limitations on the powers of government". To accept this proposition is to make the impossible capitulation to the thesis that the American Constitution is simply a constitution for the control of the authorities. The reasoning confounds politics with legalistics--and misses the vital distinctions between the exercise of political power as a matter of expediency, discretion and/or wisdom and that of constitutionality or permissibility, as a matter of legal determination predicated on the political questions previously determined.

The President exercises the power of removal as well as of appointment. The written constitution nowhere makes provision for such power of removal. Where did the President get it? The American constitutional process, and therefore the American constitution itself, cannot be understood without the political parties, their caucuses and conventions. Not a single word is used in the written constitution to recognize even the existence of political parties. The written constitution enumerates the powers and duties of the President, Congress, and the Judiciary. What about the rights and duties of the citizens--and the others living in the community. When, and how, must the citizen perform his duties? What happens if he is guilty of nonfeasance, misfeasance, or malfeasance? The written documents are silent on these matters. The answers to these questions can be found only by resorting to the unwritten portion of the



American Constitution.

The American Constitution is composed of two parts; written and unwritten. The latter consists of the implications and exceptions to the written documents, and the "powers reserved to the people", the customs, and the common law.

Custom, based upon the social standard of justice, is at the basis of the constitution. "This social constitution ....supplies organic life to the civil institutions....and thus reflects both the national conscience and the national  
(1) will." This custom is part of the unwritten American constitution.

It is the mores of the American community which recognizes the "equality among men as the basis of sovereignty and the only source whence authority and power can legitimately originate."  
(2) The proposition that this is a government of laws instead of persons is sanctioned only because sovereignty is recognized as belonging exclusively to the people. It is for that reason that the written constitutions recognize that the delegation of the people's sovereignty to the various departments prescribes to each the limits of its authority and that there is thereby constituted a government of limited powers. So understood, the written constitutions complement the unwritten constitution.

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(1) Ordronaux, C Leg US, 3-4.

(2) Ibid, 11-12.



Perhaps the most important part of the American Constitution is the common law. What is the common law? It is the common sense of the community. As the sense of the community changes, so the common law also changes.

After the Revolution the public was extremely hostile to England and to all that was English and it was impossible for the common law to escape the odium of its English origin. Judges and legislators were largely influenced by this popular feeling.... Under the influence of such ideas, New Jersey, Pennsylvania, and Kentucky legislated against citation of English decisions in the courts. There was a rule against such citations in New Hampshire.... In large part, however, it was but a phase of the opposition of the frontiersman to scientific law. There, the refined, scientific law that weighs and balances and deliberates and admits of argument is out of place. A few simple rules which everyone understands and a swift decisive tribunal best serve such a community. (1)

The vigorous good sense of the judges made over the  
(2)  
common law of England for our pioneer communities, and since then have announced the common law as they have sensed the mental climate of the public. How is this done?

One judge looks at problems from the point of view of history, another from that of philoso-

(1) Pound, SCL, 116.

(2) Ibid, 137; 115, "It has long been the orthodox view that the colonists brought the common law with them and that the English law has obtained in this country from the beginning. But this is only a legal theory. In fact the colonists began with all manner of experiments in administering justice without law and it was not till the middle of the eighteenth century that the setting up of a system of courts and the rise of a custom of studying law in England began to make for a general administration of justice according to the English law."



phy, another from that of social utility, one is a formalist, another is a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements. The same is true of juries.<sup>(1)</sup>

Thus is the common law discovered. It is the "unwritten law" of the community.

The question is sometimes presented--which is more important, or more fundamental, the written or the unwritten constitution? The better weight of authority seems to be committed to the proposition that "customary government or the unwritten constitution is subordinate to, and to that extent modified by both the written constitutions and the acts of the legislature."<sup>(2)</sup>

The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the laws of the judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators. It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical.

There are gaps to be filled.<sup>(3)</sup>

On the other hand, there is authority which submits to the suggestion that constitutional government emerged to protect vested rights and that, therefore, the independent judiciary upholds the unwritten constitution by enforcing limitations upon the written constitution.<sup>(4)</sup>

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(1) Cardozo, NJP, 177.

(2) Cleveland, OD, 313.

(3) Cardozo, NJP, 14.

(4) Haines, RNLC, 342.



Properly understood, both groups of authorities are right in their assertions. But it must be understood that they are discussing different things. When the written constitutions conflict with the unwritten constitution--stated in another way, when the matter of constitutionality or legality is opposed by the matter of political expediency --the former must give way. When, however, there is no conflict between political capacity and constitutionality, but there is question as to the proper exercise of the sovereign power conceded to be authorized, then, it is not a question of conflict between written and unwritten constitutions, but rather as to the proper manner of exercising delegated sovereign powers and those having the written sanction must prevail and be responsible to "the people".



#### 4. Interpretation of the American Constitution

(1)

The Supreme Court is a judicial tribunal. Its power extends only to actual cases and controversies between bona fide adversaries in the course of everyday litigation. It has no legislative power, no executive power, no power even (2) to advise a legislature. But it does have the power of judicial review, the power to determine whether a legislative enactment is or is not in accordance with the principles of (3) the American Constitution. What is the result of the exercise of such power?

Professor E.S. Corwin's stand is that the Court, through its power of interpretation, has largely displaced the American Constitution with its opinions. (4) For is not the Constitution what the Supreme Court says it is? And what limit is imposed upon the Court's power of interpretation which it has construed for itself?

The amended document of 1789 has become little more than a point of reference... (5)

Ernst Freund agrees, substantially, with Corwin that the Court's power of constitutional interpretation is political in nature and has resulted in revising the Constitution.

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(1) U.S. Constitution, Art. III, sec. 1, "The judicial power of the United States shall be vested in one supreme court and in such inferior courts as Congress may from time to time ordain and establish."

(2) BUL, "Supreme Court's Part in Building a Nation", Bowman, p. 446.

(3) McCullough v. Maryland, 4 Wheaton 316, (1819).

(4) Corwin, COC, 126.

(5) Op. cit.



American constitutional law represents political action through judicial methods, dependent for success upon the ignoring, by common consent, of the political nature of the process. To judge the performance of the courts by purely legal standards is to misjudge it. (1)

But Mr. Justice Frankfurter agrees with Justice Marshall that the words of the written constitution not only leave the individual justice free, but, indeed, compel him "to gather meaning, not from reading the Constitution, but from reading life". (2) Resort to the maxims and principles of the common law must be constantly had. (3)

The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law and are to be read in the light of its history. (4)

Some say that it is the Congress, not the Supreme Court, that has developed, revised, and amended our constitution.

We usually speak of the huge development of our constitution by judicial interpretation. Everything, right or wrong, is laid on the doorstep....especially of the Supreme Court. But the courts have nothing to interpret, nothing to develop, until Congress or the State legislatures have acted. Legislative interpretation, legislative development, comes first.

The courts....have merely permitted what Congress has prescribed.... In a very real sense, therefore, it may be said that the

(1) ESS, "Constitutional Law", Vol. IV, 254.

(2) ESS, "The Supreme Court", Vol. VIII, 479-480.

(3) South Carolina v. United States, 199 US 449, (1905); Gompers v. United States, 233 US 610, (1914).

(4) Smith v. Alabama, 124 US 465, 478, (1888); CUSA, 63; U.S. v. Wong Kim Ark, 169 US 649, (1898).



Constitution has been developed by Act of Congress. (1)

Yet, we must return to the fact that it is the Court which determines whether the act of Congress may or may not be given effect. This function of the Court is condemned as being out of accord with the American constitutional principle that the constitution is the property of the people, not of the judges, and that, therefore, it is for the people (through their duly elected representatives) and not for the courts to determine the principles and policies in accordance with which our constitution is to be interpreted and our government administered. (2) Thus, it is contended that when the court uses its powers of interpretation it is acting as a super-legislature.

We are governed by our judges and not by our legislatures. (3)

Is it true that because the Supreme Court does have the power to declare an act of legislation void--if in its opinion the act contravenes some provision of the Constitution --that the Court thus does amend the constitution? Is it true that when the Supreme Court reverses its own former decisions and interpretations of the constitution that it makes a new constitution for government? Is the American Constitution what the United States Supreme Court says it is? Does

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(1) McBain, LC, 30-31.

(2) Ransom, MRJ, 3-6.

(3) Read, CR, "Constitutional History and the Higher Law," H.S. Commager, pp. 231, 236.



the Court seek to impose what seems to it to be the reasonable construction, or does it seek to find out how "the people" think and announce that as the proper interpretation?

The Constitution of any community consists of those fundamental principles in accordance with which government is constructed and its orderly administration conducted. These fundamental principles develop in accordance with national cultural growth. Since society is dynamic, cultural changes necessarily modify the fundamental principles which are conditioned by such factors. Therefore, unless a static social order can be maintained, the American Constitution must continue to express itself in different ways. The American constitutional method is a process of adaptation and growth, as well as a means whereby wrongs may be corrected and governmental measures be attuned to the essentials of justice through the orderly ways of discussion and education.

It is not so much what is found in the written constitution, as the conservative, law-abiding and yet liberty-loving character....which guarantees a permanent free government to the....U.S.A. (2)

The American people ordained and established their constitution and, as Sovereign, created governmental agencies as instruments through which they might express their sovereign will. The authorities as agents cannot, therefore, extend themselves beyond the limits of the reasonable exercise

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(1) CT, American Constitutional Method, H. Cummings, 18.  
(2) Tiedeman, UCUS, 20.



of the delegated powers. The powers of the Supreme Court, no less than that of Congress or of the President, are circumscribed by this principle. The powers of the Supreme Court are different from the powers of any other authority. Its power is judicial; to adjudicate or to adjust controversies. How? In accordance with the fundamental law which represents the will of the people. The American Constitution and "the laws of the United States....made in pursuance thereof" is the supreme law of the land. <sup>(1)</sup> Thus the judicial function necessarily involves interpretation. This power of interpretation concerns itself with such questions as--What are the terms of the constitution? Are the legislative enactments in agreement with the terms of the Constitution? Even if it were conceded that all legislative enactments do in fact mirror the will of the people, when any such enactment does in fact violate a constitutional principle which is also conceded to reflect the will of the people, then we are confronted with a situation in which "the people" have two conflicting wills. One must give way. Which one? The constitution expresses the more fundamental will and therefore must take precedence. But, as we have seen, the constitution is unwritten as well as written. What are its unwritten terms? Have they changed? If so, to what extent?

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(1) U. S. Constitution, Art. VI, sec. 2.



It is plain, therefore, that this necessary function of judicial interpretation, in obedience to the stress of public opinion makes the express limitations of the written constitutions mean one thing at one time, and at another time an  
<sup>(1)</sup> altogether different thing. The court strives to give efficacy to the will of the people, which, in its largest part, is unwritten. This necessarily is a matter of interpretation. The judge and the lawyer say "law if found, not made";  
<sup>(2)</sup> and from their point of view this is true. The people, however, find difficulty in understanding this view because to them law is law, not because it is discovered, but because, having desired it, they will it and thus create  
<sup>(3)</sup> it. This is the fundamental law (the unwritten constitution) which the court finds. The court's function, therefore, is to discover the will of the people, which is the fundamental law. As the people's will changes, so must the court's decisions. It is not that the Court has changed its mind; it is that the people have now willed differently. This is to be expected in a changing society.

Thus, the Supreme Court is part and parcel of the organic process of a government resting on popular sovereignty  
<sup>(4)</sup> and registering public opinion in its governmental acts.

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(1) Tiedeman, UCUS, 44.

(2) Pound, SCL, 99.

(3) Op. cit.

(4) CT, American Constitutional Method, H. Cummings, 4.



Whenever possible, the court strives to be consistent and often makes distinctions where no real differences exist.

When this is not possible, the court simply "overrules it-  
(1)

self", i.e., the Court in determining present unwritten constitutional principles must now overrule its earlier statement of what was the constitutional principle or rule.  
(2)

Thus, in the Dartmouth College case the Supreme Court held that a corporate charter was an inviolable grant which could not constitutionally be impaired by subsequent legislation because this would be impairment of obligation of contract and void under the United States Constitution. Later in the Charles River Bridge case, the United States Supreme Court revised the application of this principle by subordinating its operation to the general welfare of the community.

While the rights of private property are sacredly guarded, we must not forget that the community also have rights and that the happiness and well-being of every citizen depends on their faithful preservation. (3)

This constitutional principle was reaffirmed in the  
(4) Beer Company v. Massachusetts case when the Court stated that there is no impairment of obligation of contract made

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(1) CT, A Nation is Brought into Being, H. Cummings, 24.

(2) 4 Wheaton 518.

(3) Charles River Bridge Co. v. Warren River Bridge Co., 11 Peters 420, 548.

(4) 97 US 25; cf also, Powell v. Pennsylvania, 127 US 678.



with a brewing or distilling corporation that its business is subsequently destroyed and its property rendered valueless, by a general prohibition of the manufacture and sale of intoxicating liquors. This original constitutional principle which is substantially modified, if not abrogated altogether, arises out of a change in public opinion.

The contracts which the Constitution protects are those that relate to property rights, not governmental.

(1)  
(2)

Likewise, in the E.C. Knight case the Court held that under the Sherman Anti-trust Act a monopolistic combination of manufacturers could not be constitutionally reached by the anti-trust laws since manufacture was not commerce and therefore was exempt from the control by Congress. A few years later, after "the people" had concerned themselves with this issue, the Court, in reconsidering the Sherman Act, held, in the Northern Securities case that while the Act might affect local conditions it could nevertheless be constitutionally applied even to transactions local in character if they operated to effect a restraint on inter-state commerce.

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(1) Tiedeman, UCUS, Chap. V.

(2) Stone v. Mississippi, 101 US 814. The repeal of a charter of a lottery company by a new provision of the state constitution is nothing more than an exercise of police power and does not impair the obligation of contract.

(3) 156 US 1, (1895).

(4) Northern Securities Company v. United States, 193 US 197, (1904).

(5) CT, The American Constitutional Method, H. Cummings, 8.



There are times when the Supreme Court simply overrules its earlier decisions. An outstanding instance was when the Supreme Court overruled the case of Hepburn v. Gris-  
(1) wold (2) with its findings in the Legal Tender Cases.

What then is the true relationship of the Court to the Constitution? The better view seems to be that the "Supreme Court feels the touch of public opinion".  
(3) The Court knows that the Constitution belongs to the people; that its function is to find the law which the people have made and to apply it to the controversies which it is called upon to adjudicate. The terms of the Constitution change with the times. This is to be expected. The Court must, therefore, discover the new terms and apply them. The Court attempts to do this by considering, not merely the "private preferences of the judges as individuals, but rather....the impressions produced on their minds by the general public sense of what is just and what is necessary in the public interest....such public discussion....is....an important and valid aid in acquainting them with some of the weighty factors which properly enter into the process of decision."  
(4)

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(1) 8 Wallace 603, (1870).

(2) 12 Wallace 457, (1871). The doctrines of the Legal Tender Cases were reaffirmed in Julliard v. Greenman, 101 US 421, and the "Gold Clause Cases", Norman v. Baltimore and Ohio R.R. Co., 294 US 240, (1937).

(3) Bryce, AC, I, 273.

(4) CT, American Constitutional Method, H. Cummings, 13-14.



Thus, as the people change the "fundamental law", the Court's pronouncement of what the constitutional principles are must change accordingly. Thus, THE PRINCIPLE OF STARE DECISIS  
<sup>(1)</sup>  
DOES NOT APPLY IN CONSTITUTIONAL LAW. It cannot; because it cannot apply to the people's will.

Sometimes, however, the Court is unable to discover the people's will, or misconstrues it. In this contingency, a constitutional amendment is in order. Thus, the eleventh amendment to the United States Constitution had to be adopted to undo the Supreme Court's decision in Chisholm v. Georgia.  
<sup>(2)</sup> The thirteenth amendment eradicated the effect of the Dred Scott decision,  
<sup>(3)</sup> and the sixteenth amendment made a Federal income tax possible over the Supreme Court's decision in Pollock v. Farmers Loan and Trust Company.  
<sup>(4)</sup>

It is the Court's function to interpret the will of the people and apply that will as it finds it. If and when the Court fails (and imperfection is possible in any humanly devised institution) the people express their will which then prevails over the Court's estimate thereof. The Court's power of discovering and applying this will necessarily involves interpretative powers. The exercise of such powers would constitute constitution-making if the members of the judiciary undertook to apply their personal wills to the

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(1) Stimson, ACPPR, 29.

(2) 2 Dallas 419.

(3) 19 Howard 393.

(4) 158 US 601; Finer, TPMG, 120.



Court's business. In the absence of definite proof to this effect--and all that is forthcoming is a series of inferences and implications to this effect based on circumstantial innuendoes--the presumption of regularity ought to apply and the Court be considered as properly performing--to the best of its ability--its delegated powers.



### 5. Definitive Summary Concept

(1)

The American Constitution is a means to an end.

The Constitution is an instrument of government, in general terms, made and adopted by the people for practical purposes. (2)

(3)

Since the Constitution presupposes an organized society, (4)

it can be considered to be a "framework of government" in the sense that the government is of, for, and by the people. That is what Judge Cooley meant when he wrote that the American Constitution is that "body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised". (5) Thus, this "complex pattern of social regulation" (6) might be regarded, not as the fundamental law, but "simply ius civile". (7)

The Constitution itself is in every real sense a law--the lawmakers being the people themselves. (8)

The Constitution as a means is "in the nature of a covenant of the sovereign people with each individual thereof". (9)

(1) McBain, LC, 4.

(2) CUSA, 62.

(3) Cooley, CL, 37.

(4) Dimock, MPA.

(5) Cooley, CL, 2; Ordronaux, C Leg in US, 173.

(6) Read, CR, "Afterthoughts on Constitutions", Carl Becker, 397.

(7) Read, CR, 127.

(8) CUSA, 636.

(9) Cooley, GPCL, 23.



The Constitution did not derive its binding efficacy from the signatures of the delegates, but from the vote of the Conventions called for that purpose.... The States ratified the Constitution, not as their act, but as the act of the people of the United States.... (1)

The Constitution....was adopted by the people through delegates elected for the express purpose of considering and deciding upon it.... (2)

The federal and State governments are in fact but different agents and trustees of the people....the ultimate authority, wherever the derivative authority may be found, resides in the people alone. (3)

It is evident, therefore, that one of the parties to this covenant is the community impersonated as "the people" acting through different agencies as the occasion demands. The other party to this covenant is the individual person who strives that his natural rights and liberties be made immutable and unassailable and who, to this end, has become a party to the covenant. Thus, this covenant, the American Constitution, is the means by which the individual persons and the community seek to guaranty to themselves certain ideals. It is the mechanism adopted to effectuate that social process, called Democracy, which is considered to be the way of realizing the desired ends by obligating the parties to the covenant to abide by its terms.

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(1) Hare, ACL, I, 92.

(2) Cooley, GPCL, 23-25.

(3) Fed, 321.

(4) Bloom, CSL, 2-3.



This covenant, by its terms, formulates the rights of the individual against the community, and reciprocally, of the community against the individual. This means that it provides for a government of laws, or, rules of conduct; otherwise there could be no rights or duties.

For practical purposes the Constitution is that which the government in its several departments and the people in the performance of their duties as citizens, recognize and respect as such, and nothing else is....(3)

Thus the Constitution is a living dominant force exercised by the people for their national and individual protection. "It is literally the voice and will of the American people....their present voice, their present will."(4)

The constitution of a country is made up of that part of the law which deals with the essentials of the governmental system.... every political unit has a constitution in this sense, with parts which may be written and others which are unwritten. We may properly speak of the United States having a constitution in this broad sense. (5)

The American Constitution is conceived of as a covenant between two persons--the community (i.e., "the people") impersonated as sovereign and each individual member thereof impersonated as subject--to follow specified procedures when making decisions about questions of common interest, policies to be adopted, or action to be taken; and by the terms of which responsibilities may be established.

(1) Wilson, CGUS, Chap I

(2) Goodnow, PCG, 2.

(3) Ibid, 10.

(4) Bloom, CSL, 6.

(5) Arneson, ECL, 4.



## B. Rights

### 1. Meaning of a Right

Grotius said that a right is that quality in a person which makes it just for him either to possess certain things (1) or to perform certain actions. Taking a cue from this observation, we may note that the matter of rights is concerned with persons and relationships.

Let us turn, first, to the concept of "person". What or who is a person? The answer to this question necessarily depends upon the purpose for which we wish to use the term "person". A biologist conceives of a person as a physical organic unity (biological organism) whose parts are related to each other in a certain way and which behave in a defined manner under predetermined conditions. The psychologist has a very different standard for determining what is a person; to him, a person is any entity which has a mind. The philosopher, likewise, has his criteria; he regards any entity as a person which is capable of exercising choice between alternatives. The sociologist, the political scientist and the legalist, too, have their tests for deciding what is and what is not a person. It should be evident, therefore, that the term "person" has, depending upon the circumstances in which it is used, different meanings. Basically, a person is an institution. It is any entity to which rights and powers, duties and responsibilities are attributed. Thus it may be

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(1) Quoted in SCL, 90.



created or abolished. It is an invention of the human mind which depends upon the factor of recognition for its very existence. Corporeality, tangibility, and human characteristics are not determinative of such recognition. Thus, before the Civil War, slaves, human beings, were not, in the eyes of the law, persons; they were regarded as so many items of chattel property. After the proper legal formalities were fulfilled, these very same units of personality became vested, in the eyes of the law, with the attributes of personality; the "things" had become "persons". This process of transformation, better still, the "creation" of the persons, was accomplished simply by recognizing these entities as having rights and duties which had not been accorded to them earlier. Thus, the fact of legal recognition, not the fact that they were human beings, made them legal persons.

A person need not be a human being nor need he have corporeality. Judge Marshall, in the famous Dartmouth College case, said that a corporation is a legal person; it is a "legal entity, invisible, intangible and existing only in contemplation of the law". That contemplation suffices. It makes the corporation real and alive. The corporation can sue its debtors, attach their wages, and sell their property to satisfy its just claim; it can be sued, its property attached and later sold to satisfy any just claims of its creditors. This person which cannot be seen or touched is



as real as anything in the community because it is recognized and treated as a person. But it is a person only to the extent that it has gained such recognition, and no more.

As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial persons. (1)

Natural persons and they alone are entitled to the privileges and immunities which Section 1, Amendment 14, secures for "citizens of the United States". (2)

There are circumstances in which, for certain purposes, entities are regarded as persons, and for other purposes they are not so regarded. A minor child, more than seven years of age, is regarded as a person for the purposes of criminal law; but, since he is considered as incapable of forming an adequate intent for this purpose, if he contracts, (3) he may avoid the contract although, if over a certain age (depending upon the State and the sex of the person) while still a minor he may be bound by the marriage contract. Thus, I am compelled to disagree in part with the very eminent scholar, Roscoe Pound, when he writes

Whatever the state may do in limiting the power of corporations to make certain con-

- (1) Stone, J. and Reed, J. in Hague v. C.I.O., 59 Sup. Ct. 954, (1939). See also Northwestern Nat. Life Ins. Co. v. Riggs, 203 US 243, 255; Western Turf Association v. Greenberg, 204 US 359, 363.
- (2) Roberts, J. in Hague v. C.I.O., 59 Sup. Ct. 954, 959.
- (3) Although in the case of necessaries he is required to pay the fair value of such necessaries; not the amount agreed upon, unless at his choice.



tracts, because the corporation gets its power from the state, it may not limit the contractual capacity of natural persons, who got their power to contract from nature, so that nature alone may remove it. (1)

The facts simply do not substantiate this conclusion.

The "state" constantly exercises its police power in circumscribing the alleged natural right of contract in the interests of the community.

Thus, it should be evident that the term "person" can be properly understood only as a concept relating to any entity, factual or fictional, to which is accorded the attributes of personality. This entity may be a single human being, no human being at all, or a whole group of people acting as a unit. A group of people will have rights as a group, as distinguished from the individuals composing the group, therefore, only when and insofar as it is recognized as having attributes of personality.

The basis of our political system is the right of the people (2) to make and alter their constitutions of government. (3)

....not only must minorities be protected from majorities, but majorities must be protected themselves....if true democracy does operate in terms of majority will, it is not the will of the numerical majority, (but the will authorized by the whole people). (4)

(1) Pound, SCL, 101.

(2) Here "the people" is accorded some of the attributes of personality, i.e., a mind, a will.

(3) Root, AGC, Washington's Farewell Address, 116; Fed, 260.

(4) Read, CR, "Minority Rule and Constitutional Tradition", Max Lerner, 204. This excerpt is an example of thinking of groups (majorities, minorities, the whole "people") in terms of persons; otherwise, it would not make sense.

Persons alone, not things, have rights.



The second dimension involved in considering rights is the matter of relationships.

(1)

....rights are but relationships between persons....

These relationships between persons may be contractual or quasi-contractual in nature and emanate as a result of claims "in rem" and "in personam". Thus, there can be no right except as there is also a duty.

(2)

Right--as the correlative of duty....signifies one's affirmative claim against another (3)  
...One does not own rights....he has them; because he has them, he "owns" in very truth the material object concerned..(4)

Rights are intangibles, not objects or things. They arise from relationships between persons. Obviously such relationships may exist in more than one place, and like other societal circumstances continuously change. Changing relationships postulate changing rights.

Rights are described as natural, inalienable, social, moral, legal, civil, political, substantive and procedural. However it might be sought to dichotomize rights, their essential nature is the same.

(1) Curry v. McCanless, 307 US 365, 366, (1938).

(2) Mellinger v. City of Houston, 68 Texas 45, (1887); Lake Shore & M.S.R. Co. v. Kurtz, 10 Ind App 60, (1894).

(3) Hohfeld, FLC, 6-7.

(4) Ibid, 12, 38.

(5) APS, "Constitutional Law" in 1938-1939", R.E. Cushman, 275; Graves v. Elliott, 307 US 383, (1939).

(6) Pound, SCL, 108, "Men are not asking merely to be allowed to achieve welfare; they are asking to have welfare achieved for them through organized society."



A right is an attribute of personality with which any entity is endowed or which accrues to it by virtue of its relations governed by the Law of Persons sanctioned by the community.



## 2. Essential Characteristics of Rights

### a. Natural Rights

The doctrine of natural law regards man primarily as an individual rather than as a member of human society. All men, it holds, were endowed by their Creator, and therefore possess certain rights enjoyed by them in a state of nature, and which no government can rightfully infringe or deprive  
(1) except with their consent. Liberties do not result from acts of government or charters of government, which are really declarations of pre-existing rights, but are founded "in the frame of human nature, rooted in the constitution  
(2) of the intellectual and moral world."

Liberty, therefore, is not the result of social compact, not a concession to man from society, or from government, but it is the gift of God to every man; liberty for self-use in order to the attainment of the ends of his creation. (3)

Because natural law antedated the creation of actual states, the "rights of man" are older, more fundamental, more universal and, therefore, more binding than the ius  
(4) civile of any particular state. The American constitutions, State and Federal, were, in fact, created by the common consent of all the individual members of the community to the end that their natural rights would be better guaran-

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(1) Goodnow, PCG, 257; UCUS, 70.

(2) Haines, RNLC, 55.

(3) Chandler, GBFC, 298.

(4) Read, CR, 5-6.



ted thereby. In his "The Responsible State", Franklin H.

(1)

Giddings points out that with the rise of political organization the juristic rights of the new order tended to become the embodiments and expressions of natural rights.

Dean Pound writes

As a theory of rights based upon a social compact....(the common law)....thought of natural rights as the rights of individuals who had entered into a contract, apart from which there would be and could be no law and nothing for the law to maintain. In either view, the law exists to maintain and protect individual interests....the common law was taken to be a system of giving effect to individual natural rights. It was taken to exist in order to secure individual interests, not merely against aggression by other individuals, but even more against arbitrary invasion by state or society. (2)

Thus the legal rights and duties became the formal expressions of natural rights and moral duties.

Jurists began by assuming that if they were moral and to the extent that they were moral, they were therefore legal. (3)

....the scheme of natural rights that the law ought to secure, quickly becomes the scheme of fundamental rights which it does secure, legal rights being taken to be merely declaratory thereof.... The law does not create them, it merely recognizes them. (4)

(1) P. 68.

(2) Pound, SCL, 100-101.

(3) Pound, LM, 31, 32, 88.

(4) Pound, SCL, 91, 92, 106. "Lawyers of the last century were brought up on the doctrine of natural rights and the conception that law exists to secure these rights to the individual as against state and society....to believe that the highest social interest was in securing to every one these natural rights."



What are these natural rights? Is marriage a natural right? If so, what kind of marriage--monogamous, polygamous or polyandrous? Manifestly, natural rights mean simply those interests which we think ought to be secured; those demands which human beings may make and which we think ought to be satisfied. "It is true that neither law nor the state creates them."<sup>(1)</sup> They are based on the assumption that there is in man an "inviolable something" which is entitled to the respect of reason.<sup>(2)</sup>

Natural rights vary and change with the ethical conceptions of the people; it is for that reason that it is often asserted that there is no such thing as an absolute inalienable natural right. "The doctrine of natural rights may be tersely stated to be freedom from all legal restraint that is not needed to prevent injury to others....the right of needless restraint."<sup>(3)</sup> What is needless must be determined in each circumstance; it is essentially a product of reason. Therefore, criticisms based on the assumption that the theory of natural rights presupposes a static social order must be discounted.<sup>(4)</sup>

It is suggested, however, that the theory of social contract as a means of guarantying natural rights is self-contradictory.

(1) *Ibid*, 92.

(2) Read, CR, "Appeal to Reason and the American Constitution," R. Bainton, 121; Pound, SCL, 92, 96.

(3) Tiedeman, UCUS, 73, 76.

(4) Goodnow, PCG, 257.



(The doctrine of *jus naturale*) reaches the extreme limits of absurdity in the social contract, in the claim that all governmental authority, and hence the binding force of law is derived from the agreement or consent of the governed; and that all men are possessed of certain natural rights, rights enjoyed by them in a state of nature, and which no government can rightfully infringe or take away. (1)

This suggestion (a) fails to recognize the factor of common consent present in the social contract; (b) it assumes a static society; (c) it removes the all-important element of human reason so necessary to understand "natural rights"; and (d) it is based on the thought that natural law and natural rights impress themselves on the consciousness of the people in the very same way irrespective of the environment, viz., that the kind of society existing as a fact, or that there does or does not happen to be a society is of no consequence (i.e., that the environment does not affect man's nature and has no bearing on his rights).

Now, it is probably true that natural rights were not invented but are the products of an unconscious growth which have held men together in effective social cohesion for many years before political organization came into being; in this case, natural rights do serve as the moral foundations of the democratic community. As such, says Franklin

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(1) Tiedeman, UCUS, 70.



(1)  
H. Giddings

Natural rights are of two categories. There are natural rights of the community, and natural rights of the individual. Both the community and the individual have a natural right to exist and a natural right to grow or develop. If mankind or a moiety of the human race has a moral right to exist, a community or society has such a right because it is only through mutual aid that human life is possible and only through such relationships that the intellectual and moral life of man can be sustained.

Has the individual person a natural right to grow at the cost of his neighbor?

If society is to endure, individual growth is subject to imperative limitations. It must be a function of inhibitions no less than of spontaneous actions. Natural justice prescribes limitations. The individual has a moral right, confirmed in natural rights, to develop on equal terms. All have equal, but only equal rights....they (may not) grow by murder, theft, or fraud. (2)

Thus, it should be plain, that "natural rights" however conceived, which serve as the roots of moral rights, do have ethical implications and cannot be asserted or exercised without limitations. "To attack an existing rule of law because it violates some natural right is like saying the law is ethically indefensible; in jurisprudence there is no room for natural rights except as they are recognized and protected by existing law."  
(3)

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(1) The Responsible State, 64.

(2) Giddings, RS, 66-67.

(3) Tiedeman, UCUS, 70.



### b. Moral and Legal Rights

Words are "vehicles of thought". The word "right" has both a moral and a legal sense.

In its moral sense, "right" (i.e., a moral right) extends over the whole field of human conduct, and refers to all those actions and forbearances which it is our moral duty (as determined by our ethical conceptions) to perform. It is the product of the social forces which reflect the prevalent sense of right as it is ethically conceived.

In a legal sense, "right" (i.e., a legal right) refers only to those actions or forbearances the performance of which is rendered compulsory by the coercive power of the government. It is a moral right which is enforceable; it is a moral right plus the power of legal sanction.

Not every moral rule commonly practiced by the mass of the people becomes a legal rule, obedience to which is enforced by legal sanction. Unless the violation of the moral rule involves some injury to the public or to other persons, there is never any public demand for its enforcement by the imposition of a legal penalty.

Yet, although the legal rule of right reflects the popular sense of what is a moral right prevalent when it was formulated, it may not, and because the popular sense of right does not remain stationary, usually does not conform

(1) Leacock, EPS, 53.

(2) Op. cit.

(3) Ordronaux, C Leg US, 15; Chandler, GBFC, American Constitutional Government, A, B.

(4) Tiedeman, UCUS, 13-14.



altogether to the popular conception of moral rights in the later stages of development. It frequently is at such great variance with the latter as to be a cause of serious  
(1) dissatisfaction. When this occurs, a new legal rule is formulated either by statutory enactment or constitutional amendment, or, by judicial interpretation of the old rule to conform to the popular will. In the latter instance, in the exercise of its power of interpretation, it devolves upon the court to determine whether the right asserted is only moral or whether it has ripened into a legal right.  
When does the moral right become enforceable as a legal right?

The precise boundaries between different rights....are evolved from their nature and purpose by reason and logic. (2)

The test as to whether the violation of the "right" precipitates an injury to the public or to other persons is usually invoked in determining the nature of the  
(3) right. Pound points out that "enforcement depends

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(1) Tiedeman, UCUS, 9.

(2) Freund, PP, PP, CR, sec. 7.

(3) Tiedeman, UCUS, 13-14.

the collection from the same, and though it is somewhat  
less well represented than the other two groups, it is  
certainly the most abundant. It is composed of a number of  
smallish species, with the greater part of the specimens  
belonging to the following three genera:—  
Lemnaceae.—The leaves are rounded and have a thin  
membrane, so that they are easily torn. They are  
covered with small hairs, which are often black or  
brownish. The leaves are very numerous, and are  
arranged in whorls, so that they overlap each other.  
The leaves are also very narrow, and are pointed at  
one end, while the other is rounded. They are  
about one-third of an inch long, and are  
about one-half of an inch wide.

Scirpaceae.—The leaves are narrow, and are  
arranged in whorls, so that they overlap each other.  
The leaves are also very narrow, and are pointed at

one end, while the other is rounded. They are  
about one-third of an inch long, and are  
about one-half of an inch wide.

(1)

ultimately upon the general will" by deciding what constitutes an injury.

This further observation is apropos: that the same social forces which create and develop the ethics of a nation create and develop its law. The substantive or fundamental law is nothing more than the moral rules commonly obeyed by the masses and enforced by the courts for the public good; the ethics of the nation are the rules of morality espoused by its moral teachers as their highest conceptions of moral development which are sometimes striven

- (1) SCL, 110, 150. Pound writes of legal rights as those which because they are enforceable on behalf of the individual are really put above the state and society, and moral rights as social rights, the product of human relationships, and, therefore, subordinate to the former. He writes (pp.110-111) ultimately all interests, individual and public, are secured and maintained because....the chiefest of all interests is the moral and social life of the individual; and thus individual interests become largely identical with social interest ....we must emphasize the individual.

Stephen Leacock, EPS, (pp. 50-52) reasons that since there are no so-called legal rights which a person has which the community may not take away, no person really has a legal right. What are called legal rights are really privileges and immunities. Likewise, the individual person can have no moral rights which he may assert against society. Thus, if there are any rights in the community, they belong exclusively to the sovereign body which "can be under no legal restriction, (for then) it would not be sovereign.... Thus the conception of sovereignty, law and right is altogether divorced from morality and ethics." The "limits" imposed on a community in its right to interfere with the natural or moral rights of the individuals (e.g., religion, private life, etc.) "are of an ethical not a legal character. Legally speaking the state is almighty."



(1)

for but not habitually practiced by the people. In the attempt to make moral and legal rights conform to the ethical conception of right, appeal is made to the natural rights.

(2)

This confounds "right with rights". Ethically, what is right is an idealistic conception of rational behavior which may or may not be realized. The moral law (including moral rights) is the code of behavior actually adopted and practiced by the community; more often than not it follows the general pattern prescribed by the ethics but deviates therefrom in important particulars. The legal rights are those moral rights which the community considers important enough to insist upon obedience and observance; "the relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in

(3)

the courts."

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(1) Tiedeman, UCUS, 15.

(2) Giddings, RS, 59.

(3) Curry v. McCanless, 307 US 365, 366, (1939),  
83 L. ed. 1347.



### c. Inalienable Rights

Are there any inalienable rights? In 1776, our Declaration of Independence announced

that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

Thus, from the beginning, the people of the United States seem to stand committed to the proposition that there are certain inalienable rights, and that the American Government was instituted to protect and maintain them.<sup>(1)</sup> This doctrine of inalienable rights holds that there are certain cardinal, or natural, rights which no government ought to,<sup>(2)</sup> and which ours cannot, take away; thus this doctrine appears to be founded on the idea of natural rights. For, if rights are not natural (i.e., endowed by the Great Creator), then they must have been acquired as a result of social relationships, in which case they can be alienated through a cessation of such relationships. Thus, as between natural and other kinds of rights, only natural rights would be inalienable. In fact, it has been seriously stated, that man has two kinds of natural rights (alienable and inalienable); that when he becomes a member of society

(1) Root, AGC, "Experiments in Government", 82-83.

(2) Stimson, ACPGR, 30.



he voluntarily surrenders his alienable rights for the further security of his inalienable rights.

The state is a voluntary society composed of those who yield certain alienable rights in order to safeguard the inalienable. (1)

Thus, says Elihu Root

Individuals have rights independent of the State....against the State....government is not the source of these rights, but is the instrument for the preservation and promotion of them.... (2)

He insists that the inalienable rights of the individual to life and liberty, although asserted under government, are independent of government, and, if need be, may be invoked against government. Thus, when inalienable rights are suspended (as they may be in cases of necessity) the government is a dictatorship and the popular will can be expressed only through revolution. (3)

Another general proposition which is laid down to prove that there are inalienable rights in American society is that this fact is recognized by the American Constitution by definite limitations of the legislative power of the Federal

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(1) Read, CR, "Appeal to Reason and the American Constitution", Roland Bainton, 123.

(2) Root, AGC, "Essentials of the Constitution", 98.

(3) Ibid, 99. The government he is talking about is, of course, the democratic government in the United States.

(4) Ibid, 114-115.



and State Governments as to the rights "which have been established by God and Nature".  
 (1)

There are eternal principles of justice which no government has a right to disregard.... Some acts, not expressly forbidden, may be against the plain and obvious dictates of reason. (2)

It is claimed that the individual does not possess inalienable rights through the state, "but by his own nature he has inalienable rights and indefeasible rights" which spring not from man but from God and Nature, and that when the individual enters the community he establishes the conditions of his membership therein and the state holds fast  
 (3)  
 to these conditions as rights.

Our Constitution imposed its limitations upon the sovereign people and all their officers and agents, excluding all the agencies of popular government from authority to do the particular things which would destroy or impair the declared inalienable rights of the individual....all powers of government find their justification only in their adaptation to secure (these) rights of the individual. (4)

It occurs to this writer that there are several inherent defects in this theory of inalienable rights. In the first place if there were in fact an inalienable right natural to man with which he was endowed by God and Nature, then it really seems futile to discuss the alienability of inalien-

- (1) Jellinek, DRMC, 81; CR, "Constitutional History and the Higher Law", H.S. Commager, 228. Judges of state and federal courts have suggested natural law limitations distinct from and superior to even written constitutions. Calder v. Bull, 3 Dallas 386. Wynehamer v. Peo., 13 NY 378
- (2) Bank of State v. Cooper, 2 Yerg (Tenn) 599, (1831).
- (3) Jellinek, DRMC, 48, 80, 82.
- (4) Root, AGC, 100, 167.



able rights. If a right were inalienable, it simply could not be alienated by anybody; neither by the man who possesses it nor by any other man because God created the man, and this inalienable right is part of the man. If this inalienable right became alienable, the individual would then cease to be man. The Declaration of Independence and many writers avow that there are not only inalienable rights, but, indeed, some of them are certain, viz, life, liberty, the pursuit of happiness. Do the facts substantiate the theory? Life is alienable; the community may compel the individual to give his life to defend the country. It may be argued (a) that although life is alienable the right to life is inalienable, and (b) that the individual consented to fight for his country by his continued membership in the community. But, even if a distinction is made between Life and the right to Life, if the right to Life were inalienable its possessor could not alienate it even with his consent. To admit that inalienable rights may become alienable in a certain contingency is to admit that there are no inalienable rights.

Second, the doctrine of inalienable rights accords rights to man because he is a human being. It has already been amply demonstrated that human beings as such do not have any rights; that it is only as they acquire recognition by the community as beings "persons" that they have rights, not otherwise. The Declaration of Independence proclaims that all men are created equal, not that all men are born



(1) equal. It was seriously contended by such eminent thinkers as John C. Calhoun and Jefferson Davis, before the Civil War, that men are not born; that babies are born and they grow to be men. When does a child become a man? The transformation is created by societal recognition. Society creates men. In this light, we can properly understand the proposition that all men are created equal and are endowed by their Creator with certain inalienable rights.

The most friendless and lonely human being on American soil holds his right to life and liberty, and all that goes to make them up, by title indefeasible against the world, and it is the glory of American self-government.... (2)

In other words, the inalienable rights which the person enjoys are inalienable because he is a member of society and to alienate such rights would mean the end of such society. Life and liberty of the person may be alienated with due process of law. Any process is not due process; the process must accord with and be sanctioned by democratic customs and usages. (4) The inalienable rights which the community safeguards to the person are those which, if denied to the individual person, would necessarily mean the end of that society. Thus, the inalienable rights are not determined

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(1) Jellinek in DRMC erroneously interprets the Declaration of Independence to say (56) that all men are born free and equal.

(2) Root, AGC, 112.

(3) U. S. Constitution, Amendments V and XIV.

(4) Public Clearing House V. Coyne, 194 US 497, 508, (1904).



by the nature of man as a human animal, but rather by the nature of man as a social person.



#### d. Social Rights

It is plain that rights come into being only as a result of sanctioned relationships entered into between persons or individuals who are recognized as being competent to enter into sanctioned relationships. In this way, community organizations are created and a society is born. Thus, rights are social incidents and do not exist except as there is a society within which they may find expression and as pertaining to relationships actually entered into.

When writers concern themselves with "natural rights," "inalienable rights," or "inherent rights," they really are discussing powers,<sup>(1)</sup> not rights. It is as a result of such confusion of terms, and therefore a confusion of ideas, that so much misunderstanding has arisen and so many palpably mistaken, misleading or false propositions are enunciated. An endowed power which is inherent in Man, as such, is quite different from an endowed right inherent in the person. The sources of endowment are quite different.<sup>(2)</sup>

Powers emanate from the nature of man as a human being. Rights emanate from the social relations to which the person is a party.<sup>(3)</sup> Society is the creator of all rights, but

(1) Ordronaux, C Leg US, 15; GBFC, 298.

(2) Tiedeman, UCUS, 78. "The prevalent doctrine of natural rights was formulated and made a part of the organic law of the land to be respected and enforced until repealed or changed by the proper authority."

(3) Kent, CAL, II, 1. "Right itself, in civil society, is that which any man is entitled to have, or to do, or to require from others, within the limits prescribed by law."



not of all powers. Certain powers inherent in the nature of man, as such, cannot be alienated so long as man is man; but there are no rights which society may not take from any person. Therefore, all rights are social rights; as such, they may be exercised only within the limits of the social order and may not be claimed as absolute or irrevocable. (1)

An example of such confusion of thought follows. In "The Revival of Natural Law Concepts," Charles G. Haines quotes E. V. Abbot (2) as saying that "there are a number of constitutive principles of private right which have been so wrought into the fabrics of our institutions that they cannot be abrogated" and that "among these indilutable rights.... (is) the use of natural powers....as long as they do not thereby injure others." (3)

Here we find the idea that natural powers are private rights, distinguishing between social rights and private rights, or, distinguishing between those rights which affect only one person and those which affect more than one. Such

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(1) Holcombe, FMC, 352. The Freedom of assembly was restricted by at least three limitations: First, people could not assemble for an unlawful purpose; Secondly, they were bound to conduct their assemblies peaceably; and, Thirdly, they could not persist in assembling, if their assembly, though lawful and peaceable, would provoke such resentment in the community as to create a clear danger of uncontrollable disorder.

(2) "Inalienable Rights and Eighteenth Amendment," Col. Law Rev., Feb. 1920.

(3) Haines, RNLC, 339.



distinction seems to be made for the sole purpose of using the term "rights" in characterizing the natural powers of the individual so that it may be asserted, in terms, that there are inalienable rights. There seems to be no real or good reason for the substitution of terms except that through such substitution it seems to be possible to prove what the writer has set out to prove. In other words, in order to prove that there are inalienable rights, the term "inalienable rights" is substituted for the term "natural powers"; therefore, by proving that there are natural powers it seems that the existence of inalienable rights has been proved.

The fallacy is obvious.

When such a substitution was attempted by claiming that there are natural and inherent rights (confusing rights with powers) which may not be alienated by constitutional amendment and that therefore such amendment must be held to be invalid, the United States Supreme Court in the National Prohibition Cases refused to countenance the thesis that there are inalienable rights, rejected all the arguments in favor of limitations on sovereign power in recognition of such rights, and sustained the validity of the Eighteenth Amendment to the United States Constitution.

(It was argued that) the power to amend was limited to changing the subject matter

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(1) Haines, RNLC, 338; T.M. Cooley, "Power to Amend Federal Constitution", Michigan Law Journal, April, 1893.

(2) 253 US 350, (1920).



already in the Constitution. The amendment did, for the first time in our history, touch directly the lives of private individuals.... this might mean practically an annihilation of the several states as sovereign political units....this argument did not convince the Supreme Court. (1) There does not seem to be any limitation upon the power to amend the Constitution, except that no state may be deprived, without its consent, of its equal suffrage in the Senate. (2)

All rights (no matter how private or personal may be their consequences or exercise) are created by society and may be circumscribed or repudiated by it.

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(1) Arneson, ECL, 14-16.

(2) Op. cit. The exception here noted also results from a contractual social relationship.



### 3. American Constitutional Conception of Rights

It is important to recognize that there are several conceptions basic to a proper understanding of the American scheme of life: (a) natural powers or "natural rights" which existed before a society was established, (b) the theory of social contract which necessarily assumes a constitution based upon a compact or covenant the exact manner of making and time of execution of which is not exactly stated nor its details precisely set forth but which is necessarily based on a corollary proposition which does bear proper authentication, i.e., popular sovereignty, <sup>(1)</sup> and (c) constitutional rights, a consequence thereof. These conceptions result from an historical evolutionary process through which the natural powers of man, which individuals possessed in that state of nature antedating organized political life, are transformed into the fundamental or substantive rights of the civic PERSON under the constitution. <sup>(2)</sup> <sup>(3)</sup>

There are those, of course, who, like Carl Becker, insist that "the Constitution did not create rights, it merely recognized them; it did not restrain human impulses, it merely gave them the right of way.... Imprescriptible rights have such validity only as prescriptive law confers upon them." This theory fails to explain existing facts. In the first place, the theorists employ the trick of using

(1) Goodnow, PCG, 258-259.

(2) Haines, RNLC, 58; CAL, Vol. II, 1.

(3) Read, CR, "Afterthoughts on Constitutions", 394, 396.



the word rights for natural impulses or natural desires to prove that there are natural rights, and then find themselves in the embarrassing enigma wrought by their logic that their natural and therefore imprescriptible rights are prescriptive. In the second place, the proposition is based on the assumption that the written constitution is the only constitution under which the people of the United States live. They have not explored all the circumstances which their preferred theory undertakes to explain. Does the Constitution create rights? The United States Supreme Court says yes and lists a few of them: "To demand the care and protection of the Federal Government over life, liberty, and property, when on the high seas or within the jurisdiction of a foreign government, the writ of habeus corpus, etc.."<sup>(1)</sup> Thus, the facts and the better authority compel acceptance of the proposition that the American Constitution did create rights. In fact, this is the raison d'etre of the Constitution. It helps solve "the great puzzle of civilization--how to secure permanent concert of action without sacrificing independence<sup>(2)</sup> --through the establishment of constitutional rights.

Constitutional rights are of two kinds: substantive and procedural. Authorities differ as to the proper classification of constitutional rights. Some say that the

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(1) Slaughter House Cases, 16 Wallace 36, 37, (1873).

(2) Fiske, API, 94.



fundamental distinction is between political rights and individual rights.

The enjoyment of political rights is simply a means for accomplishing the ultimate results of affording the best protection to individual rights. (1)

Some say that the distinction is properly made only when considered in terms of civil versus political rights.

In general it may be said that the rights protected by the equal protection clause are civil rather than political. Civil rights are more fundamental, while political rights may from one point of view be considered as auxiliary to civil rights in the sense that, in order to protect the latter, political rights are granted. (2)

(3)

Some differentiate between political and legal rights.

This distinction is made with the view that political rights concern themselves with policy determination, deal primarily with fundamental or substantive rights and that the legal rights are concerned with matters of restraint pursuant thereto. (4)

It is apparent that although the different authorities make what appear to be separate and distinct classifications of constitutional rights, basically, they all entertain the same idea which takes different forms and appears in terms of different concepts. The concept through which the idea expresses itself varies according to the point of view of

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(1) McClain, CLUS, 292.

(2) Mathews, ACS, 429.

(3) Wilson, CGUS, 4, 5, 16, 23, and authorities therein cited.

(4) Friedrich, CGP, 185; LC, 5.



the particular approach made. In fact, constitutional rights are either substantive or procedural. Sometimes the same act may be properly interpreted as being in the exercise of a procedural right as well as the exercise of a substantive right. The same act may partake of the nature of each different kind of right because of the different relationships under which it may become exercised. So also, the act of speaking may be a substantive right, interpreted by some as a civic right or civil right, i.e., a right belonging to the person by virtue of his membership in the civic community, as well as a procedural right, called by some a political right because it is exercised in the performance of a political function. This act, both as a substantive or civil right, as well as a procedural or political right, is a legal right because it is enforceable. The same act of speech may also be considered as a moral right. The nature of the right is conditioned upon its background. Constitutionally speaking, all rights are social, and are properly regarded either as substantive or procedural, since they are concerned with civil and political affairs.



a. The "Rights of Man"

Does the individual human being, who lives in American democratic society, have any other than constitutional rights? In other words, is the American Constitution the source of all rights to which any one or any group of "the people" may lay claim? Are there no other than constitutional rights?

The written provisions of the Federal Constitution offer no answer to these questions. The State Constitutions--that of the Commonwealth of Massachusetts, for example--do present the solution.

All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.<sup>(1)</sup>

The Preamble to the same constitution announces that

The end of the institution, maintenance, and administration of government is to secure the existence of the body-politic, to protect it and to furnish the individuals who compose it with the power of enjoying in safety and tranquility the natural rights, and the blessings of life; and whenever these great objects are not obtained, the people have the right to alter the government and to take measures necessary for their safety, prosperity and happiness....<sup>(2)</sup>

Thus, the American constitution recognizes that it is an instrumentality conceived and utilized for higher ends; that the rights of persons which the society has created

(1) Mass. Constitution, Declaration of Rights, Art. I.

(2) Mass. Constitution, Preamble.



through the constitution are means to other--and more important--ends, viz., the natural rights or powers (whichever is preferred) of men and women as human beings as distinguished from the rights of the same individuals constitutionally recognized as civic and/or legal persons.

In this sense, the American Constitution does recognize and sanction the natural rights of man. Indeed, it was for the preservation and maintenance of such rights that the Constitution was born. Constitutional rights exist for legal persons so that by their exercise the natural rights of the same individuals as human beings might be enjoyed. Were this not so, there would be no right of revolution.



### b. Rights Are Not Absolute

Since society is always in a fluent state, rights are interpreted and enforced under constantly varying circumstances. (1) Changes in economic and social conditions properly require a new interpretation of the conceptions of rights which are based on the new relationships between persons. If new interpretations of the relations between persons were not forthcoming (i.e., new concepts of the application of the principles of right) progressive development (2) would be obstructed.

To consider a specific example: the right of liberty. The principle is "that there must be the freest right and opportunity of adjustment". This principle must remain unaltered and absolute. Liberty suggests, not only freedom of action, but the unrestricted enjoyment of the result of beneficial action so far as such freedom is not inconsistent (3) with like freedom on the part of others. But the ideal of liberty as a right cannot and should not be fixed from generation to generation; were the right of liberty fixed, (4) it would not be liberty at all.

The concept of the right of liberty has evolved and (5) taken on new significance. In the Coppage Case, it was

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(1) Ordronaux, C Leg US, 600.

(2) Goodnow, PCG, 269.

(3) McClain, CLUS, 293.

(4) Wilson, CGUS, 4-5.

(5) Coppage v. Kansas, 236 US 1, (1915).



declared that the employer's right of liberty includes the right to "hire and fire", which embraces the right to force an employee to choose between his job and his labor union.

(1)

In the Wagner Act Cases, the Supreme Court decided that the right of employees to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing "is a fundamental right" growing out of the fact that employees are helpless singly to deal with an employer and that "discrimination and coercion to prevent the free exercise of this fundamental right" is a proper subject for condemnation by competent legislative authority."

From a purely negative concept restrictive of legislative power liberty thus becomes a positive concept calling for legislative implementation and protection. (2)

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(1) NLRB v. Jones and Laughlin Steel Corporation,  
301 US 1, (1937).

(2) Corwin, COC, 124.



### c. Substantive Rights

In a broad sense the American Constitution is itself a  
 (1) bill of rights because it is the embodiment of all those social relationships out of which rights arise. It recognizes rights of persons which are not included in the written constitution.

Their non-enumeration in the Constitution cannot primarily affect their existence; and the provision against their denial or disparagement is in the nature of an affirmation of their retention by (the people). (2)

This fact explains the reasoning of the authorities who, conceiving the American Constitution to be a written document, write that natural rights have an existence apart (3) from the law, and why they say that the Constitution (4) did not create any rights which did not antedate it. The written constitution assumes the existence of fundamental or substantive rights and undertakes to protect them against encroachment.

They are assumed to exist--they never are expressly granted to the people, as such a

(1) Fed, II, 57.

(2) Ordronaux, C Leg US, 269.

(3) Goodnow, PCG, 259; Thorpe, EACL, 195, "The supreme law cannot violate them. They comprise the Bills of Rights, or Declarations of Rights of the State constitutions and the first ten Amendments of the Federal Constitution."

(4) CUSA, 589; Barran v. Baltimore, Peters 243, (1833); U.S. v. Cruikshank, 92 US 542, (1876); Brown v. Walker, 161 US 591, 606, (1896); Davis v. Beason, 133 US 333, 340, (1890).



grant would have been inconsistent with their character as natural rights--and the government is forbidden to violate them. (1)

What are substantive rights? Substantive rights are sometimes called "individual natural rights". These socially recognized natural rights are not inalienable.

Foremost among these are the fundamental or absolute rights, as Blackstone called them, of personal security, personal liberty, and private property of which no person may be deprived without due process of law. (4)

....The natural, inalienable, inherent rights of the citizen....spring from the very nature of free government....have no force either to restrict or extend the.... provisions of the Constitution....the doctrine that the "spirit" of the Constitution is to prevail over its language has no more legal validity than has the doctrine of natural law. (5)

They are not absolute.

....The person....is entitled to his fundamental rights; so are the several States and the United States entitled to their respective fundamental rights; but they are sovereignties; the person is not, and his fundamental rights to life, liberty and property give place to the rights of the sovereign ....As against sovereignty, the person in the final test has no rights whatever; that is no rights that are recognized and protected by constitutional law. (6)

(1) Goodnow, PCG, 261-262.

(2) Pound, SCL, 102-103.

(3) Contra: Goodnow, PCG, 267, "Courts of the United States have really taken the position that there is no due process of law by which the individual may be deprived of these absolute, substantive, whereat, natural rights.

(4) Holcombe, FMC, 341.

(5) W. W. Willoughby, PCLUS, 40-41.

(6) Thorpe, EACL, 199-200.



To argue that these rights are absolute is to argue that the person, as an individual, is possessed to some extent, at least, of sovereignty. Obviously, this is not true.

Substantive rights are those attributes of personality without which endowed powers cannot be exercised and which exist only as they are formulated and established as being superior to the constitutional implementations.



#### d. Procedural Rights

If it is true, as it has been suggested, that the rights not delegated, but retained by the people, are the fundamental rights,<sup>(1)</sup> then both substantive and procedural rights are fundamental. Yet, no matter how fundamental the rights may be, they are always subject to the constitutional limitations.

No man can make a plea of a fundamental right as making him "above the law". The law accords with the fundamental right.<sup>(2)</sup>

Since substantive rights are those which have been formulated and established as being superior to the constitutional implementations, procedural rights must be those which result from the processes inaugurated to effectuate the terms of the Constitution. They are those rights which insure due process of law<sup>(3)</sup> and which, therefore, give meaning and practicality to the substantive rights. Thus, such procedural rights as trial by jury, the right of confrontation, and the right to counsel<sup>(4)</sup> make the substantive right of equal protection of the laws significant. They are complementary. Yet, it is important to note that although procedural rights complement the substantive rights, they can have no justification without the substantive right upon which they are based. The converse of this proposition is not true. Therefore, in the exercise of a procedural right, a substantive

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(1) Thorpe, EACL, 194-195.

(2) Ibid, 197.

(3) Beck, TCUS, 214, "conformity with these fundamental decencies of liberty".

(4) Goodnow, PCG, 263.



right may not be abridged.

Political rights are procedural rights. Persons have political rights, not as ends in themselves, but as means to serve other ends. Thus, voting and citizenship are not co-extensive. Although the rights of citizens to vote may not be denied or abridged by the United States or by any State on account of race, color, previous condition of servitude or sex, there may be educational disqualifications. These disqualifications, however, must apply equally to all who seek to become endowed with the procedural rights, i.e., the qualifications for procedural rights cannot be exercised or maintained in such a way as to deprive persons of their substantive rights, i.e., in the exercise of procedural rights and the incidents accompanying it must always be in subordination to the substantive rights of persons as members of the civic society.

(1) Minor v. Happersett, 21 Wallace 162, 178, (1875); U.S. v. Cruikshank, 92 US 542, (1876).

(2) U. S. Constitution, Amendment XV; Nixon v. Herndon, 273 US 536, (1927); Nixon v. Condon, 286 US 73, 89, (1932). A State Democratic Convention which restricts membership to whites and which is not subject to State control is acting constitutionally--5th Amendment does not prohibit wrongful individual acts. Grovey v. Townsend, 295 US 45, (1935), James v. Bourman, 190 US 127, (1903).

(3) Ibid, Amendment 19.

(4) Williams v. Mississippi, 170 US 213, 220, (1898).

(5) Previtt v. Wilson, 242 Ky. 231, (1932). A statute which imposed literacy test on women voters, not required of men, is unconstitutional. Opinion of the Justices, 240 Mass 601, (1922); 83 NH 589, (1927), where to be a qualified elector renders one competent as a juror, women became jurors, also. Comm. v. Welosky, 276 Mass 398, (1931); certiorari denied, 284 US 684, (1932). State v. Walker, 192 Iowa 823 (1921); State v. James, 96 NJ Law 132, (1921).



Civil and political equality for members of all races alike is one of the obvious characteristics that distinguish a commonwealth from superior kinds of states. There was nothing inconsistent with the principle of civil equality in the subsequent recognition by the Supreme Court of the validity of racial distinctions in American law, provided that they did not serve to camouflage unjust discriminations against the weaker race. But it was a mistake to carry the principle of political equality so far as to ignore real differences in the political capacity of individuals, irrespective of race, as was done by the Reconstruction Acts of 1867. (1)

Thus, procedural rights accrue to the person as a result of his recognized capacity to fulfill certain functions.

They are those rights which emanate from the willed-relations entered into pursuant to the established law and which may be exercised properly by the person to whom they accrue only (2) within the limits of the constitution.

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(1) Holcombe, FMC, 163-164.

(2) Ibid, 341, 352, freedom of assembly is restricted.



### C. Majority and Minority

#### 1. A Group Conception

Irrespective of the theory of social behavior advanced --be it atomism or organicism--there are some facts which are certain and concerning which there can be no controversy--although there may be reasonable disputations concerning their proper interpretation, meaning, importance and significance. First, there can be no community or society without people. Second, each person in the community has various special interests and points of view appropriately consonant therewith. More or less conscious of his community of interest with others, instinctively or by reason of his special interests, the individual person tends to flock together with those others whose interests are similar. Third, through (1) this operation of the herd instinct, groups are born. Fourth, society is composed of groups as well as of individual persons.

The rulers of states consequently have to deal, not only with the individuals who are its members, but also with the groups into which those individuals are more or less definitely herded. (2)

A society is not made up primarily of individuals. It is made up of an innumerable number of smaller societies. Men and women become associated together for the accomplishing of an infinitely large and various number of purposes, and each of these different associations constitutes a society, whose reality is

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(1) Modern psychologists prefer "fundamental urge" to "instinct".

(2) Holcombe, FMC, 207.



determined by the tenacity and the scope of the purposes which have prompted the association. (1)

And fifth, the same individual person may be a member of more than one group.

In the sphere of politics, there is no such creature as the economic man.... The politician must deal with actual men, not with logical abstractions. Voters are men animated not only by the desire for wealth, but also by other desires and feelings. They are men of this or that race and color as well as economic and social condition, or this or that creed and culture as well as class. Politicians do not know men merely as men or even as breadwinners; they know them also as Masons, Odd Fellows, or Knights of Columbus, or Rotarians, Elks, or I.W.W.'s, as members of the American Legion, the Grange, or the General Federation of Women's Clubs. Among the bonds of union in these various groups are the property interests and other economic considerations, which undoubtedly play a great part in the actual process of government. (2)

Thus, we see that groups are aggregations of persons who are behaving in concert to the end that they may thereby better achieve their interests than they might have done individually. The different groups, therefore, have differing interests.

We represent different constituencies. The judge has a city with a compact constituency, largely trading and industrial. I represent the far-flung grazing grounds and wheat fields of the high plateaus of eastern Oregon. It is natural that we should have differing points of view on many questions and different interests, but we are both vitally concerned

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(1) Croly, PD, 184-200.

(2) Holcombe, FMC, 208.



with the matter of control and distribution of that power at Bonneville. (1)

Yet, the individual person, performing different functions, has different interests and is a member of different groups. As a consumer he wants low prices, as a producer he wants high prices; as an investor he tries to make money expensive, and as a borrower he prefers cheap money; as a taxpayer he strives for economy in government, and as a citizen he demands more service. Do his interests as a taxpayer conflict with his interests as a citizen--or--is the taxpayer's group opposed to other civic groups? Does one deny the other?

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(1) Rep. Pierce in Cong Rec, March 11, 1936, 3715.



### a. Groups versus Classes

At this point, it is well to distinguish between groups and classes. The class theory protagonists divide the entire social membership into two or more classes--usually into only two classes--from which classification, once established, the individual person can never escape by his own efforts. In terms of classes the interests of one are necessarily antithetical to the other. Social mobility as a consequent of private initiative and ability is not even conceived of as a possibility. Thus, the class theory postulates a static society by putting the control over the change of individual interests beyond the power of the individual person, and by insisting that there can be but one interest upon which the whole life of the individual is, or should properly be, based. Thus, for example, the class theorists might say that the American community is divided into two camps, those who pay the taxes and those who reap the benefits from the taxes; if you are in one camp, you cannot be in the other at the same time, for the rights of the one are adverse to the rights of  
(1)  
the other.

Those who conceive of society as the gross sum of individuals and groups composed of these same individuals assert that the person does have differing interests and does belong to different groups to better enable him to achieve these several interests. The group theory proponents can see nothing

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(1) Holcombe, FMC, 208.



inconsistent in the actions of the individual person who belongs to the taxpayers' league (which seeks to reduce taxes) and the Citizens Better Welfare group which insists on more and better service from the government. He says that although the immediate interests of both groups may seem to be adverse one to another--inasmuch as you cannot get more service if you reduce the funds for operating the government--the groups are not conflicting at all.

In fact, both groups are working for the same end, but through differing means. Both want greater efficiency in government. One says, not that we want less service and, therefore, cut taxes, but give us the same service at a reduced cost. The other group says, not that we want to raise taxes to have better service, but that if we are already paying such taxes let us get the service which is due us. In other words, both groups are dissatisfied with the service rendered for the taxes paid; one group seeks to maintain the same service and yet reduce the taxes, the other to increase the service for the taxes paid. Are the interests of these groups adverse one to another? Possibly. But, these groups "instead of being essentially hostile elements in public opinion become supplementary. They interpenetrate one with another."  
(1)

Thus in comparing the concept of a class with the concept of a group we find (a) both are used for purposes of

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(1) Croly, PD, 303-329.



classification, (b) both may serve useful functions in the community, and (c) both may represent a dichotomy of conflicting interests among the people. Here the similarity ends.

The class theory proponents postulate conflict between the interests, deny the factor of "social mobility" as a significant factor in the social order, and insist upon a single, primary, and all-important determinant of human action as the only proper basis for considering society; thus, they perceive in the community two or more conflicting and hostile interests about which the individuals are compelled by circumstances to rally--these interests being immutable and the alignment continuous so that the society is static. The group theory advocates see no all-consuming desire and interest by which any individual person is necessarily engulfed so that he can be a father, a manufacturer, and a taxpayer and thus become affiliated with the interests represented by such groups as the Parent-Teachers Association, National Association of Manufacturers and the Taxpayers' Alliance. They admit of the phenomenon called social mobility and say that a person can have a certain personal interest today and an entirely different interest tomorrow; that no one single factor predominantly motivates all behavior of all persons at all times.

We may, of course, expect to see in any body of men....very different combinations of the parts upon different points. Many of those



who form a majority on one question may become the minority on a second, and an association dissimilar to either may constitute the majority on a third. (1)

The democratic philosophy is concerned with groups--not with classes. The groups are conceived of as small societies--or action systems--which have a purpose to achieve and which, once such purpose is achieved, no longer have any reason to exist. Groups, therefore, are always means to ends.

Majorities and minorities are groups as distinguished from mere aggregations of individuals or classes of persons. Although the method for determining which group exists is one of regarding numbers, (2) this is by no means the whole story. Counting, let us say, one hundred persons does not create a group of that number. It is only as persons are actuated by a common sense conditioned upon a common impulse of passion or interest that a group comes into being. The numerical count serves only to determine whether the group is a majority (3) or a minority, and nothing else.

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(1) Fed, II, 168.

(2) Fed, I, 260.

(3) Finer, TPMG.



## 2. Majority and Minority Defined

"Majority" is a term which may be variously interpreted; yet, the general concept that it refers to a number of persons in excess of fifty per cent always prevails. Does it refer to the entire membership, to a quorum, or to those persons actually participating in some act?

The same principle prevails in incorporated societies as in the community at large.... The majority here means the major part of those who are present at the regular corporate meeting. There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case, a majority of those who appear may not act; but in the former, a majority of the definite body must be present, and then a majority of the quorum may decide. (1)

It is necessary, therefore, to understand the constitutional rule invoked in determining how a majority is to be determined. Inasmuch as we are concerned with a democracy, all persons having rights cannot avoid the responsibility of their proper exercise through nonfeasance. In the absence of positive action, inaction is construed as acquiescence; otherwise, social action might become impossible. The general rule is, therefore, that "majority" refers to that number of persons, in excess of fifty per cent, actually participating in a designated procedure. (2)

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(1) Kent, CAL, vol. II, 293.

(2) Cooley, GPCL, 40.



"Majority" with reference to a question on the ballot, shall mean more than one half of those voting upon the question. (1)

"Majority vote" and "two thirds vote", respectively, (shall mean) the vote of a majority or two thirds of the voters present and voting at a meeting duly called....(2)

There are instances, however, when, due to the importance and gravity of the questions to be decided, or the nature of the body to which power is delegated to determine certain matters of policy, a different rule has been adopted, and the number of votes is more definitely ascertained. Thus, in ratifying amendments to the Federal Constitution, the "three-fourths" rule prescribes ratification by legislatures or constitutional conventions in thirty-six States, and not simply (3) ratification by 75% of the States which may take action.

Yet, the two-thirds vote in each House which is required in proposing an amendment is a vote of two-thirds of the members present--assuming a quorum--and not two-thirds of the (4) entire membership, present and absent.

Another example is the rule to discharge a committee in the Congressional House of Representatives. The general rule (5) is that when a quorum is present, the House does business

(1) Mass. General Laws (1932 ed.), chap. 50, sec. 1.

(2) Ibid, chap. 44, sec. 1

(3) United States Constitution, Article V.

(4) National Prohibition Cases, 253 US 350, 386, (1920); Missouri Pacific Ry. Co. v. Kansas, 248 US 276, (1918).

(5) Manual for the General Court of Mass., 1939-1940. Rules of Mass. House of Representatives, Rules 63-69. Notes of Rulings on the Senate Rules, Rule 55.



through the vote of a majority of the Congressmen actually  
 voting on each matter. House Rule XXVII, however, pro-  
 vides for a determination of a majority in terms of the  
 total membership of the House, and not in terms of the Con-  
 gressmen participating. When such a provision is made, it  
 supercedes the general rule.

It is in the interest of proper and orderly  
 parliamentary procedure that the number of  
 signatures....should be definitely known and  
 ascertained in advance. The number required  
 should be stable and not variable from moment  
 to moment. It might well be that deaths of  
 members could happen without the House being  
 advised at the very moment. Likewise, re-  
 signations, which properly are sent to the  
 Governors of the States, might not at the  
 immediate moment be called to the attention  
 of the House....

....the Chair is constrained to hold that  
 under the "discharge rule" of the House,  
 requiring "a majority of the total membership  
 of the House", the exact number of 218 mem-  
 bers was intended, and is necessary before a  
 discharge petition is effective, and no less  
 number will suffice, irrespective of tempor-  
 ary vacancies due to death, resignation or  
 other causes. (2)

The same principle is applied also in local affairs,  
 only when so specified.

"Majority vote"....as applied to cities  
 (shall mean) the vote taken by yeas and nays  
 of a majority....of all the members of each  
 branch of the city government where there are  
 two branches, or of all the members where

(1) "When a majority of the total membership of the House shall have signed the motion, it shall be entered on the Journal, printed with the signatures thereto on the Congressional Record, and referred to the Calendar of Motions to Discharge Committees."

(2) Cong Rec, April 15, 1936, 5732-5734.



there is a single branch of city government, or of a majority....of the commissioners where the city government consists of a commission. (1)

A minority is ascertained in the same manner as is the majority, except, of course that a minority is less than fifty percent of the membership.

By a majority is meant those persons "united and actuated by some common impulse of passion or interest" numbering more than one-half the number of persons present and participating in a socially predetermined, commonly accepted, institutional procedure. This institutional procedure may specify that more than one-half of the total group membership or of a quorum is required. The essential principle which obtains in a democracy is that the rule which shall govern must be definite and known in advance.

A minority consists of those persons acting in a group whose constituent membership is less than one-half the membership which under the predetermined rule constitutes a majority.

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(1) Mass. General Laws (1932 ed.), chap. 44, sec. 1.



### 3. American Constitutional Conception of Majorities and Minorities

#### a. Intra-Group Relationship

American society, the creation of interdependent beings, involves relationships in which each person complements the other. It is to be expected that in any society of free men, differing points of view will be entertained by different groups of men on different subjects; yet always, the difference is subordinated to the likeness of ideals.

It is because they have like wants that people associate in the performance of unlike functions. (1)

Thus, we find that there exist in the American community groups of persons seeking the same ideals, but possessed of varying opinions as to the best way to achieve their common ideals.

The more highly civilized the society becomes, the more highly developed become the sensibilities of the persons and the more sensitive do they become to social variations. This impels persons to associate with other like-minded persons to better achieve commonly desired objectives. But the more highly civilized persons become the less likely are they to think alike on all subjects and, therefore, the greater do they realize the need for associating in groups. They subordinate their minor differences to their basic agreements.

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(1) Fed, II, 168.

(2) MacIver, Soc, 7-8.



As the society develops the number of associations in the  
(1) community increase, and we discover even more shades of opinion. A "pseudo-social-mitosis" occurs in the community's thinking. This becomes evident when groups appear. Each group thinking its own way about the community. Most groups are small; some are large. There are many minority groups; but, only one majority group on any one question at any one time.

The very terms "majority" and "minority" indicate that they are conceptions of only a part of a larger whole. The majority is that major part of something even bigger; the minority is a minor part which is quite inadequate and incomplete without the other parts. Thus majorities and minorities are groups within groups. They exist only as other groups also exist. Thus, the very terms majority and minority connote an intra-group relationship.

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(1) MacIver, Soc, 16, "An organized group is an association."



b. Majorities and Minorities as Democracy's Instrumentalities

1. Matter of Expediency

A democracy is that kind of a society the members of which undertake one with another to accept, for the purposes of self-government, the deliberate judgment of some predetermined group within their midst. Democracy is a social process by means of which all the people in the community participate in the formulation of decisions for common action which will be binding upon them all. It is a system of social behavior by means of which it is sought to arrive at solutions to common problems which might prove satisfactory to the many variant opinions in the community, thus preserving universal goodwill and cooperation. This is achieved, democratically, through the integration of thought and will.

The group idea is a composite idea evolved through free admission of difference. In fact the only use for my difference is to join it with other differences. To begin with individual thinking and end with "joint thinking." The differences are not lost in the result, they are integrated. There results from the process "a mutual appreciation and conservation of all the values which all the groups to the conflict hold as vitally significant". Integration....demands a unity on the intellectual level. We come together thinking differently and end thinking alike. We evolve a composite idea in which all of the different viewpoints of the members are harmonized--as though the group itself became a mind with an idea of its own--and the result is a way of joint action which appeals to everyone concerned because it comprehends the desires of all. (1)

(1) MacIver, Soc, 242-244.



Thus, the main concern of the politics of democratic government is not representation; it is the modes of association. It is not a matter of majority or minority rule; it is rather the interweaving of "majority and minority ideas".<sup>(1)</sup>

(2)

Democracy cannot mean "majority rule". If it does, then the minority would be ruled but would not rule. This would be but a step away from "majority tyranny".<sup>(3)</sup> But democracy does not mean that the majority rules. Many times the will of a mere majority does not prevail and more often a majority is not required. And when democracy allows the majority will to prevail, we discover that in fact "the government is not confided to any one majority but to a succession of majorities."<sup>(4)</sup>

To repeat, democracy does not mean that the majority governs. Democracy cannot be said to exist unless all the people, majorities and minorities, actually do participate--positively and constructively--in government. But the functions of majority groups in the processes of democratic government are quite different from the functions of minority groups. Each group has its own functions essential to democratic government to perform. These functions are supplementary and complementary. Thus, majorities and minorities

(1) Follett, NS, 146.

(2) To the effect that democracy does mean "majority rule", see Ransom, MRJ, 71-72.

(3) Friedrich, CGP, 258, writes that the dangers of majority tyranny are implied in "thorough democratization".

(4) Croly, PD, chap. 15.



are devices which democracy employs in government. They are the techniques used to aid in the solutions to problems.

The American Constitution is a democratic constitution. The very fact that it has imposed limits upon the majority group and circumscribed its power to control through the system of checks and balances makes it democratic. The principle of checks and balances is democratic because it recognizes that both majorities and minorities have rights and duties.

The American Constitution treats majorities and minorities as devices by means of which certain ends may be accomplished.

The Constitution is neither wholly national nor wholly federal.... In requiring more than a majority....it advances toward the federal character; in rendering the concurrence of less than the whole number of states sufficient, it....partakes of the national character.

....as all exterior provisions are found to be inadequate, the defect must be supplied by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places....all the appointments....should be drawn from the same fountain of authority. (2)

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(1) Smith, SAG, 214-215, "Minority domination must be carefully distinguished....from majority control....a system of constitutional checks which hedges about the power of the majority on every side is incompatible with majority rule."

(2) Fed, I, 260, 353.



Thus, majorities and minorities are the techniques which democracy uses to solve its problems in the judicial courts, the legislative courts, in the forum of public opinion.



## 2. A Trial and Error Process

This democratic technique of finding answers to the problems under consideration is essentially a trial and error process. No ~~pretext~~<sup>use</sup> is made that the majority is always right. It is assumed, however, that in matters concerning general policy determination, a solution based on a more comprehensive integration of multifarious experiences is more likely to be right than one not so determined. But the principle of infallibility is not indulged.

To balance a large state or society....is a work of so great difficulty, that no human genius....by the mere dint of reason and reflection, is able to effect it. The judgments of many must unite in the work; experience must guide their labor; time must bring it to perfection, and the feeling of inconveniences must correct the mistakes which they inevitably fall into in their first trials and experiments. (1)

In using majorities and minorities as an aid in determining a course of action, the very practical question arises as to how large a majority must be before the democracy will adopt its opinion as its will. This problem must be considered in terms of the importance of the question presented and the demonstrated capacity of groups charged with the responsibility to handle such situations. The founders of the Constitution and those now in charge of its operations realize that "there is no panacea for error, and no substitute

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(1) Hume's Essays, "Rise of Arts and Sciences, I, 128,  
quoted in Fed, 170.



(1) for wisdom." Hence, majorities and minorities, as devices used in government, are applied differently in different situations with the aim "to satisfy all the parties to  
(2) the compact".

Thus, when a decision is rendered by the Supreme Court of the United States or the Supreme Court of any State, the majority principle in its highest form is applied. A bare majority is regarded as adequate. Five to four decisions are not uncommon. But the decision of the Court so obtained may be wrong. The majority and minority technique may again be applied to correct this situation. How the technique will be applied depends altogether on the way in which the situation is again considered. If the Court reconsiders its decision (by a 5-4 vote), a mere majority again suffices. But where the question is to be considered in terms of a formal constitutional amendment, then a mere majority might not be adequate. Thus, after the United States Supreme Court delivered  
(3) its decision in the case of *Chisholm v. Georgia*, the Eleventh Amendment to the United States Constitution reversed the decision; but the reversal here required a different application of the majority principle.

Likewise, when the New York Court of Appeals rendered a series of "unpopular" decisions against the constitutionality

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(1) Beck, TCUS, 204.

(2) Fed, II, 169.

(3) 2 Dallas 419, (1793).



of laws providing for minimum wages and maximum hours for  
(1) government employees "an exasperated public reversed them all and removed all constitutional barriers by constitutional  
(2) amendment."

Thus, the democratic technique of using majorities and minorities to attain solutions to problems must be regarded as a trial and error process. The aim is to achieve an integrated will.

Democracy means the will of the whole, but the will of the whole is not necessarily represented by the majority, nor by 2/3 or 3/4 vote, nor even by unanimous vote; majority rule is democratic when it is approaching not a unanimous but an integrated will. (3)

The technique does not guarantee that the proper results will be achieved each time; but it does allow for improvement.

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(1) People ex rel Cossey v. Grout, 179 NY 417, 420.

(2) Ransom, MRJ, 77-78; N. Y. Constitution, Art. XII, sec. 1.

(3) Follett, NS, 142.



### a' Significance of the Requirement of Unanimity

The democratic process requires a socially integrated will as a condition precedent to the execution of the decision finally agreed upon. In fact, a true democratic decision for action is impossible unless all the members of the group and/or all the groups within the community have found a solution with which their opinions are in accord; in other words, a true democratic decision and the integration of the several wills in the society are cotaneous.

Early in the history of the evolution of democratic processes, when man's needs and problems were comparatively simple, man's instruments, devices and techniques were relatively simple. Democracy, from the earliest times until today, insists on doing nothing unless and until there is concurrence. The easiest way to achieve concurrence is to collaborate and discuss until all agree. In early days this was relatively simple: "the people" would sit around and talk and talk until all agreed on the final result. Unanimity was the rule. The society did nothing until and unless all agreed. They had to arrive at a decision, too; they either all agreed, or they did not leave until they found a proposition on which all agreed.

As society developed, it became more and more difficult to arrive at a solution upon which all agreed because of the multifarious interests which had meanwhile blossomed. "The people" could not sit around and discuss the matter



indefinitely; an answer had to be attained within a limited time, since other interests equally as important clamored for attention. Something had to be done. So, "the people" finally and unanimously declared it to be their will that from that moment on they would all concur in any and all decisions made by the group, if the decisions were arrived at through a certain formula. This formula permitted the adoption of solutions by the whole group if and when more than half their number were of the same mind. There were many matters, however, which were conceived to be of greater importance--as to them, a mere majority was considered inadequate; something more should be required--a two-thirds or three-fourths vote, perhaps. And thus was created the democratic devices for achieving the necessary integrated will.

Yet, there were certain matters which were considered to be of such importance that the democratic techniques of expediency should not here apply. Principle must not be sacrificed to expediency, however euphamistic be the rationale thereof. Thus the American Constitution requires that no person may be convicted of any crime unless a petit jury be of that unanimous opinion.

The jury is pre-eminently a political institution; it should be regarded as one form of the sovereignty of the people: when that sovereignty is repudiated, it must be rejected, or it must be adapted to the laws by which that sovereignty is established. The jury is that portion of the nation to which the execution of the laws is intrusted,



as the legislature is that part of the nation which makes the laws; and in order that society may be governed in a fixed and uniform manner, the list of citizens qualified to serve on juries must increase and diminish with the list of electors. (1)

In a jury....there is no question of counting up similar ideas--there must be one idea and the effort is to seek that. (2)

(3)

The Federal Constitution provides "that no state, without its consent, shall be deprived of its equal suffrage in the senate". This is another example of the vestigial remains of the principle of unanimity in American Constitutional democracy.

(4)

"If a time should come," writes Herman Finer, when the rich and populous States....feel they cannot any longer wield equal authority in the Senate to smaller and poorer States, there is likely to be extraconstitutional violence to settle the question. There is a theoretical point where, since the vote is of permanent and alterable significance, elections would cease to be fought by rhetoric and where murder would be instituted as the only effective electoral procedure short of this." The United States Supreme Court has held, since the time of this pontifical pronouncement, that any part of the Constitution can be amended. (5) Therefore, although under the present terms of the American Constitution

(1) De Tocqueville, D in A, 363.

(2) Follett, NS, 110.

(3) Article V.

(4) TPMG, 122.

(5) Hawke v. Smith, 253 US 221, (1920); Rhode Island v. Palmer, 253 US 350, (1920).



a State cannot be deprived of its equal suffrage in the Senate without its consent, this part of the Constitution can be amended without its consent, effectively depriving it of its suffrage without its consent.

Unanimous opinion, in the sense of yesteryear, that all persons must have like mind as to what should be done in particular cases, is not much more than a guiding post in American Constitutional law. The principle of unanimity under the American constitutional system is achieved by abiding with the instituted procedures, devised for the circumstances of the case. Since, as a matter of practicability, strict adherence to the principle of unanimity would produce so many impasses that very little, if anything, would be achieved, expediency has dictated that the interpretations and practices of the principle be modified as occasion demands, even though the theory be construed to prevail.



### b' Role of a Majority

The majority is a device which the American democracy uses to formulate decisions for action. But, unless there is unanimous approval, express or implied, that the subject is a proper one for determination via this method, tyranny of the majority results.

The power of acting by a majority....must be grounded on two assumptions; first, that of an incorporation produced by unanimity; and second, an unanimous agreement that the act of a mere majority....shall pass with them and with others as the act of the whole. (1)

Majority rule, therefore, does not mean that the majority decides what to do and then carries out its decision.

The majority does not govern. American Constitutional government is not based on the unlimited confidence in majorities. (2)

....upon what, then, is that of majority rule founded? First, waiving the impossibility of an objective measure of the importance of such person or group, it is clear that, normally and in the long run, the majority possesses overwhelming power, physically and mentally. (It always gets the army on its side in the end.) Secondly, since, on the democratic assumption, every conscience is as worth as any other, and there is eternal doubt who is right, the majority has a sound claim to rule. Thirdly, unanimity is impossible to achieve. Fourthly, to admit the right of a minority to rule involves the difficulty, which minority? It gives all minorities equal right, that is, it destroys the integration of society. Majority rule serves as an integrative associative force--you must overcome your

(1) Friedrich, CGP, 140.

(2) Cooley, GPCL, 41, "Restraints are imposed on temporary majorities; MPP, Vol. I, 322, Jefferson's First Inaugural. If will of majority is to prevail, it must be reasonable.



(1)

differences, and unite in order to rule.

Yet, although its actions or decisions need not have any binding or moral authority, the majority rule is a "necessary constituent of any practicable democratic organization".  
(2)

If "majority rule" does not mean that the majority rules, and if democracy means government by all the people, then what does "majority rule" mean? "Majority rule" is the title given to a rule of conduct under which the community operates. American constitutional democracy uses the "majority rule" as a method for deciding in certain cases what its course of action ought to be; it uses the majority rule when it sees fit to do so and discards it in other instances.

The place and function of the majority is delimited by general ideas as to the ends for which government should strive, the means that should be used to attain these ends, and the principle that should actuate all the members of a free democratic community. The sole reason for the appeal to the majority is found in the fact that the will of the majority is as close as we can get to an accurate expression of this consensus of opinion and sentiment which is the ultimate source of authority.  
(3)

When the "majority rule" is constitutionally invoked, a repudiation of the will of the majority is tantamount to a repudiation of government. The operation of the "majority rule" sometimes produces consequences which are indeed anomalous.

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(1) Finer, TPMG, 69.

(2) Croly, PAL, 280.

(3) ISE, 166.



There was the party of Clay, of Adams, of Calhoun and of Jackson, and the election of 1824 was fought out among these factions. Andrew Jackson received the largest number of votes in the electoral college but not a majority of all the votes cast, and when the election was thrown into the House of Representatives, a combination of Clay and Adams resulted in the election of the latter. (1)

Perhaps the majority of the American people did not concur in the final result of the election. Yet, the "majority rule" was practiced.

The points to be observed are, first, that the "majority rule" is a device for doing some thing which may or may not be fitted for accomplishing the end sought; and second, "majority rule" neither means "people's rule" nor does it guarantee democracy. A majority is only a democratic technique of action.

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(1) AGMR, 67.



### c' Functions of a Plurality

A plurality consists of that number of persons less than half the whole number (whether determined in terms of participation or membership) but larger than any other group. It is the largest minority when there is no majority.

A plurality is frequently accorded those rights and powers which would normally be possessed by the majority group.

In elections, the person securing the highest number of votes for an office shall be deemed and declared to be elected to such office; and if two or more are to be elected to the same office, the several persons, to the number to be chosen to such office, receiving the highest number of votes, shall be deemed and declared to be elected; but persons receiving the same number of votes shall not be deemed to be elected if thereby a greater number would be elected than are to be chosen. (1)

In many States, if no candidate receives a majority vote, a second run-off election is conducted between the candidates who received the largest pluralities. (2) Thus, where the "majority-rule" principle is strictly adhered to, a plurality candidate is nominated rather than elected. But where the plurality rule also prevails (especially is this true in the Northern and Eastern States) candidates for local and minor offices, particularly, achieve election by receiving a plurality vote. Here the plurality assumes the role of the majority.

(1) Mass. G.L., chap. 50, sec. 2; Mass. Const. Amend. 14.

(2) Cleveland, OD, 291. This is true most frequently in the Southern States.



### d' What Minorities Do

The minority group, as well as the majority group, is a device employed in democratic government. The function of minorities is not alone to criticise. Indeed, the minority has a very important and effective role in democratic government. Its powers and rights operate as positive inhibitions against the majority. Especially is this true when an extraordinary majority is required before action can be taken.

There are provisions forbidding the legislature to expel a member without a vote of an extraordinary majority, usually two-thirds. The advantage of such provisions to small minorities is very evident. (1)

As the majority is concerned with the problem of consent, the minority is concerned with the problem of constraint. "The minority is the expression of the relation which exists between the problems of procedure and constitutional government." (2)

From another point of view, the importance of the service which minority groups render needs no amplification when, in the absence of majorities, minorities become pluralities.

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(1) Cleveland, DIR, 450.

(2) Friedrich, CGP, 382.



#### 4. When Majorities and Minorities Have Rights

As we have already seen, majority groups and minority groups are devices which democracy uses for solving some of its problems. These entities are clothed with certain powers for the better fulfilment of those functions with which they have been charged. As entities clothed with powers, it becomes necessary to exercise those powers. This entails a matter of relationships between these entities and other entities or persons. As these groups, used as devices, are clothed with rights and charged with duties, they correspondingly acquire the attributes of personality and assume the characteristics of a person.

Whether any group, which is always an artificial entity --be it majority or minority--has any rights is altogether a matter of impersonation. To the extent that the entity is regarded as a person having powers to exercise and a claim on others for the fulfilment of obligations, to that extent does the group have rights.

Since majorities and minorities are used for different purposes, they are given different powers. Because they are persons having different powers, they are accorded different rights which are the attributes of personality with which they have been endowed.



The nature of and the scope within which the rights attributed to majorities and minorities may be exercised are determined by the right of the American people to have its policies and service personnel determined by the constitutional method, i.e., voting. Thus, majorities and minorities, as groups, are limited in the exercise of their rights to that of policy determination and the selection of service personnel.



## CHAPTER III

COMMON GROUP RIGHTSA. The Right of Association

The very idea of government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. (1)

The right to assemble peaceably and the right to associate for lawful purposes are rights of personal liberty secured by the American Constitution to all persons without regard to their citizenship. (2) The right of association is the right of persons to join one with another to the end that they may become organized for collective action. (3) It is the right of persons to organize into groups, as functional entities, to achieve socially approved ends through socially approved means. The right of association applies with equal force to religious, (4) labor, (5) educational, (6) and civic (7) groups. Although the exercise of this right, like

(1) U.S. v. Cruikshank, 92 US 542, 552, (1876); CUSA, 599.

(2) Stone and Reed, JJ. in Hague v. Committee for Industrial Organization, 59 Sup Ct 954, (1939); Gitlow v. New York, 268 US 652; Whitney v. California, 274 US 357; Stromberg v. California, 283 US 359.

(3) Hughes, J. in N.L.R.B. v. Jones and Laughlin Steel Corp., 301 US 1, (1937).

(4) Watson v. Jones, 13 Wallace 679, (1872).

(5) National Labor Relations Act, 49 Stat. 449, sec. 7.

(6) Pierce v. Society of Sisters, 268 US 510, (1925); Meyer v. Nebraska, 262 US 390, (1923).

(7) Hague v. C.I.O., 59 Sup Ct 954, (1939); Kent, CAL, Vol. II, 279, "At common law, every parish or town was a corporation for local necessities, and the inhabitants of a county or hundred might equally be incorporated for special ends.... American law (affords) numerous examples of persons and



the exercise of other rights, is subject to the police power  
 (1) of the state, its exercise is necessary if the American Constitution is to continue to be a democratic constitution.

....labor has the right to organize....espionage has become the habit of American management. Until it is stamped out the rights of labor to organize, freedom of speech, freedom of assembly will be meaningless phrases. Men cannot meet freely to discuss their grievances or organize for economic betterment; they may not even express opinions on politics or religion so long as the machinery of espionage pervades their daily life. (2)

The right of association is the right of persons to form groups. In other words, a group comes into being because its constituent personnel has exercised the right of association, and the group's right to exist depends upon the right of these persons to continue to associate. As democracy's instrumentality, a group is given powers so that democratic ends may be achieved. The functions to be performed by these entities, called groups, determine what these powers will be. The group, as an entity endowed with certain powers, acquires rights without which it could not properly exercise these powers. Thus, the group becomes a person with rights and duties commensurate with its endowed powers--and (3) no more. As a person, every group has the right to

collective bodies of men endowed with a corporate capacity, in some particulars declared, and without having in any other respect the capacities incident to a corporation."

(1) Davis v. Massachusetts, 167 US 43, sustaining Comm. v. Davis, 162 Mass 510.

(2) VFSRL, Preliminary Report, No. 46, Senate Committee on Education and Labor, 2-3, 8.

(3) Although freedom of speech and assembly are rights secured



associate with other persons so that it may better perform those functions for which it was created. This right of association, which is common to all persons living in a democracy, is enjoyed in common by all groups which come to be sanctioned within the framework of American constitutional democracy.

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by all persons by due process clause of the Fourteenth Amendment, natural persons, not corporate persons, are authorized to maintain a suit in equity to restrain infringement of rights of freedom of speech and assembly. U. S. Code Annotated, Title 8, sec. 43.



### B. The Right to Exist

The American Constitution was ordained and established "to protect the people's rights, the rights of the whole people, or of any part of the people, or even of one individual (1) as against the people". It was also established to provide for the common defense. (2) No argument is required to demonstrate that these propositions would be untenable unless the people had a right to exist. There is no point in defending a person's rights unless that person were supposed to have the right to live. Our attention centers, therefore, not on whether "persons" (groups and individuals) have a right to exist, but on what is the constitutional conception of the right to exist.

Through the ages, from the days of Tacitus to the era of John Dewey, thinkers have concerned themselves with the simple, yet profound, question--What is Life? Whenever they have arrived at a conclusion, it has always been, in substance, that Life is activity. "To be is to do." Life has no meaning except in terms of action. To exist must mean to live; to live must mean to do. All groups, no less than any other persons, therefore, have the right to participate in social activities. What the groups may do and what they may not do depends upon the functions they are supposed to perform. For example:

(1) Stimson, ACPPR, 27.

(2) Constitution of the United States, Preamble; Holcombe, FMC, 339.



On the afternoon of Memorial Day, May 30, 1937, in the city of Chicago, Illinois, ten people received fatal injuries when city police dispersed a large group of striking steel workers and their sympathizers who were marching in the direction of the plant  
....

The cause of and responsibility for the encounter has been the subject of sharp dispute by the police, the union, and the public. The police have charged the demonstrators with conspiracy to capture the Republic Steel plant by violent means and assert that the casualties were a regrettable but necessary incident to their efforts to disperse a riotous mob. The union, on the other hand, accuses the police of a brutal attack upon a group of citizens in the exercise of their constitutional right peacefully to assemble and picket. (1)

It is plain, therefore, that the manner in which each group behaves, thus exercising its right to exist, is determined by the purposes for which it was created. Every group, whose methods and ends carry social approbation, has a right to exist. Neither a majority nor a minority group, as such, has any right to exercise powers. Majorities and minorities, as democratic techniques, can only express concurrence or dissent as a means of reaching group decision with respect to proposed action to be taken by the whole community. As the American Constitution imbues majorities and minorities with personality, they come to have rights and duties; but they remain, nevertheless, artificial persons created for certain purposes. As such persons, the right to function as a properly sanctioned and integrated unit in the social order

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(1) VFSRL, Report of Senate Committee on Education and Labor, July 22, 1937, Report No. 46, Part 2, p. 2.



is common to all groups. This is the American Constitutional conception of the right to exist.

Since Being is Activity, the American Constitution recognizes the liberty of the "person", as distinguished from the entire group, and undertakes to protect this liberty by regulating the conduct of others. (1) Thus our Democracy holds that the right to exist can itself exist only when all persons are equally free. (2)

They refrain from attacking the rights of others in order that their own may not be violated. (3)

If an infraction of such equality of rights occurs, American Courts are open to all "including even aliens, without discrimination". (4) A person's constitutional right to exist is always trespassed upon when any other "person" undertakes to deprive or to deny to him the right to exist. When this occurs, the person so transgressing has acted ultra vires, has rendered a disservice and has forfeited his own right to exist.

For example: When a corporation has acted ultra vires, the court may order its dissolution, and it becomes dead; if a natural person is convicted of murder, this person forfeits his own right to exist, and execution or life imprisonment effectually causes this person to cease to exist;

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(1) Root, AGC, 86, 91.

(2) Pound, SCL, 86.

(3) DeTocqueville, D in A, I, 313.

(4) Smith, CIR, 2.



if any group, not an incorporated association, behaves in a manner not constitutionally sanctioned, it may be prohibited from functioning in any one of several ways--police power may be invoked to prevent the group from meeting, the members of the group might be convicted of conspiracy, an injunction may issue, etc.--and the group no longer has a right to exist. Because all groups have a right to exist, no group has the right to exert upon any other person (individual or group) force or duress, without the latter's consent, thus curtailing or abridging its right to exist.

A seeming exception is in the instance of that group called "the government", the politically-organized group instituted for the purpose of effectuating "the will of the people" by compelling conformity thereto in accordance with the instituted procedures. But this is no real exception, however, because this group is the only one which carries the community's sanction, i.e., is constitutionally endowed, in the use of force within the defined limits of the American Constitution.



### C. The Right to Self-Determination

Since rights spring from social relationships entered into between "persons", every right, which is really a claim of interest in one's favor against another "person", carries along with it a duty. Thus where A and B have entered into some contractual relationship, a right may accrue therefrom to A and a duty to B. But in the exercise of this right, A has the responsibility, usually implied, not to exercise his right in a way that would be unnecessarily injurious to B, and B has the right to have A exercise his right reasonably as agreed.

Groups, like other persons, have rights. Why does the community clothe groups with rights? It is because the community expects the groups to do something. Groups, democracy's instrumentalities, are endowed with rights because the community expects them to render service. The duty to render service is the only justification for any "person" (majority or minority) to exist. Service is every group's *raison d'etre*. To perform this obligation, the American Constitution accords to every group the constituent right, as determined by the law governing that form of organization, to self-determination by giving to its members the right to share in the control and management of the group, the right to hold the servants responsible to them, and, consequently, the right to give support to or withhold support from the group leaders.



....all persons have equal rights....in the employment of their faculties as they see fit, so far as the public welfare does not require that they be restricted in order that others may have the same enjoyment of life, liberty and the employment of their faculties.... (1)

The "faculties" which group-persons use in determining what their lawful behavior will be are the constituent groups.

If the community is to be a democracy, its constitution must provide for self-determination by those persons (2) who compose its membership. This explains why the Fifth and Fourteenth Amendments to the Federal Constitution protect the right to contract to every person by the due process clause. (3)

It could not have been intended to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. (4)

The right of self-determination means that every "person" is free to choose what he will do.

Thus a university can determine for itself what the requirements for admission and attendance shall be and the persons seeking to study therein are free to decide for themselves whether they will or will not comply with such

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(1) McClain, CLUS, 289.

(2) Holcombe, FMC, 206.

(3) CUSA, 637.

(4) Plessy v. Ferguson, 163 US 537, 544, (1896).



(1)

requirements and thus acquire rights.

On March 1, 1875, Congress passed "An Act to protect all citizens in their civil and legal rights", commonly  
(2) known as the Civil Rights Act.

Section 1. All persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theaters and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Section 2 of this law made any violation of the preceding section a penal offence and provided for the punishment for such offenders. In considering, on appeal, the convictions of several defendants for violating the terms of this law by refusing accomodations and privileges to negroes in an inn, a hotel, in the dress circle of Maguire's Theater in San Francisco, in the Grand Opera House in New York, and in the ladies car on the Memphis and Charleston Rr. Co., the Supreme Court of the United States declared  
(3) this law to be unconstitutional and void. The Fifth Amendment prohibits the Federal Government and the Fourteenth Amendment deprives the States of the power to inter-

(1) Hamilton v. University of California, 293 US 245, (1934). Fourteenth Amendment does not confer on a conscientious objector the right to attend a State university without taking the prescribed military training course.

(2) 18 Stat. 335.

(3) Civil Rights Cases, 109 US 3, (1883).



fere with the rights of persons to self-determination; but when it comes to a question of private rights between persons

gentlemen and ladies choose friends and associates for themselves; there can be no system of legislation that compels A to invite B to his house or treat him in a friendly manner. The farthest point reached by the law is that the objection of A shall not prevent B from the use of public facilities; and the farthest social right that can be claimed, without bringing down the denunciation of the community, is the right of C to invite B and treat him as a friend, whether A would invite him or not. (1)

The Court declared, through Mr. Justice Bradley, that it would be absurd to affirm that, because the rights of life, liberty and property (which include all the civil rights that men have) <sup>(2)</sup> are protected against invasion by Federal and State governments, "that Congress may therefore provide due process of law for their vindication in every case". If a "person" other than a politically-organized entity invades the rights of another "person" without sanction of the State, constitutionally authorized, the rights of the injured party" remain in force and may presumably be vindicated by resort to the laws of the State for redress." <sup>(3)</sup>

(1) Hart, AGAC, 32.

(2) Twining v. New Jersey, 211 US 78, (1908); Re Quarles, 158 US 532, (1892).

(3) Civil Rights Cases, 109 US 3, 17, "The wrongful act of an individual unsupported by any such authority is simply a private wrong." Whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accomodations with passengers of another race is a question of interstate commerce and to be determined by Congress alone. Louisville N.O. and T. R. Co. v. Mississippi, 133 US 587, 590, (1890). A Louisiana statute requiring interstate



Thus, the right of self-determination is recognized by the American Constitution through the inhibitions it has levied  
 (1) on the Federal and State governments and by protecting this right in the Courts when any other person attempts to impair it.

The right of self-determination, however, like all other constitutional rights, is construed in the light of the principle Salus Populi est Suprema Lex.

The enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, is subject to such restraints as the Government may prescribe for the good of the whole. (2)

In the effort to enforce this constitutional principle, Congress enacted and the Supreme Court sustained the Anti-  
 (3) trust Act, Railways Hours of Labor Acts of 1907 and  
 (4) 1926, the Employers' Liability Act of 1908, the  
 (5) Adamson Act of 1916, and the National Labor Relations  
 (6) Act of 1935. (7)

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carriers to permit Negroes and whites to intermingle freely in all parts of their trains or ships was held to be a regulation of interstate commerce and therefore invalid. *Hall v. DeCuir*, 95 US 485, (1878). But when an interstate railroad established rules and regulations permitting white and colored passengers to occupy separate compartments, and Congress had not made any regulation in the matter, it was held a reasonable regulation irrespective of the fact that a state statute also required that there be separate accommodations. *Chiles v. Chesapeake and O. R. Co.*, 218 US 71, (1910), *McCabe v. Atchison, T and S.F. R. Co.*, 235 US 151, (1914).

(1) *Colgate v. Harvey*, 296 US 404, 430, (1935).

(2) *Corfield v. Coryell*, 4 Wash (US) 371, (1823).

(3) 26 Stat 209.

(4) 34 Stat 145; 48 Stat 1188.



The National Labor Relations Act, Section 7 provides

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Speaking through Chief Justice Hughes, the United States

(1)

Supreme Court said that under the N.L.R.A. the representatives designated by a majority of employees in any bargaining unit are the exclusive representatives of all the employees in this unit for purposes of collective bargaining. The N.L.R.B. is empowered to designate units, thus giving them constitutional recognition. In answer to the argument that this law is unconstitutional because it restrains employers in their right to determine for themselves with whom they will bargain and that it interferes with the right of self-determination by the minority of employees in a designated bargaining unit, the Court reiterated, in effect, that the right of self-determination, a fundamental right which the American Constitution accords to all persons (employers, labor, majority groups, minority groups),  
(2)  
cannot be asserted in derogation of the general welfare. In other words, the right of self-determination must be exercised to accord with the principle that the welfare of

(5) 35 Stat 65.

(6) 39 Stat 721.

(7) 49 Stat 449.

(1) N.L.R.B. v. Jones and Laughlin Steel Corporation, 301 US 1, (1937).

(2) Highland v. Russell Car and Snow Plow Co., 279 US 253, 261, (1929).



the whole people deserves first consideration. To insist that an employer must bargain with the representatives of his employees and that the employees must bargain collectively through representatives chosen under the "majority rule" is not to curtail the constitutional right of self-determination by the employer or by the minority of the employees. (The employer is not in business to hire employees and the latter do not hire out to the end that they may bargain individually or collectively.)

The right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer is a fundamental right, interference with which is a proper subject for condemnation by competent legislative authority. (1)

Employees, as a unit, have the right to self-determination and the minority is simply a part of the larger group, with procedural rights. Minority groups, as such, do not have rights; it is only as they come to be impersonated that they acquire rights. In this case, unless the minority-group of the employees can achieve recognition as a separate unit or group, it serves only as a technique for choosing the representatives of all the employees in that unit, and no more. Whether the minority-group ought to be designated as a separate group with its right of self-

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(1) Edward J. Corwin in Cong Rec, Aug. 13, 1937, 11383. Cf. New Republic, Aug. 4, 1937, "The Court Sees a New Light."



determination can be answered only by considering all the circumstances of the case.

The right of self-determination is enjoyed in common by all "persons" to the end that each might render service  
(1)  
to the community.

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- (1) What is and what is not serviceable must be determined in every case by the community.



#### D. The Right to Law

The man whose protection from wrong rests wholly upon the benevolence of another man or of a congress, is a slave--a man without rights.--Benjamin Harrison.

A law is a rule of conduct or a principle of behavior which the members of the community accept for the governance of their actions.

....no constitutional provisions can give power to the courts unless there is a reverence and respect for law in the hearts of the people and a firm disposition on their part to abide by and uphold the decisions which their judges render. (1)

Rights accrue to persons as a result of the operation of the Law. The sum of all the laws comprises the constitution. Thus, the essential and primary characteristic of constitutional government is that it is a government of laws. (2)

The Constitution....stands as a citadel of principles.... (3)

Therefore, the first, and in some respects, the greatest of all the rights, is the Right to Law. (4)

One of the principle reasons why the American Constitution was contrived was to establish justice. The very essence of justice postulates a process of adjustment of con-

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(1) Willoughby and Rogers, IPG, 58.

(2) Ibid, 57.

(3) Chandler, GBFC, 24.

(4) Stimson, ACPFR, 27, 31.



(1)

flicting interests. To know when justice has come, i.e., when the process of adjustment is complete, some standard or criterion is necessary. The Law serves as the measuring stick. Law is not intended to control the actions of the  
  
(2) great majority of people; (3) the Law is intended to coerce a rebellious minority into observing "those rules of conduct (4) the infraction of which will inflict injury upon others."

The Right to Law is the right of every "person" in a constitutional democracy to a definition of those principles of social behavior which are accepted and acted upon by the community. The right to due process of law is the right to compel everybody else to conform to the Law; it is the right, common to all "persons", to have all other persons living in the community perform their duty to obey the law. The right of due process of law is the right to have the law interpreted and applied in consonance with the terms of the American Constitution.

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(1) Holcombe, FMC, 210.

(2) Whenever this fundamental thought is overlooked, legislation produces nothing but a bunch of dead letters, still-born laws that never did and never could become a living rule of conduct. The legal rule is therefore fashioned after the prevalent sense of right--Rechtsge-fuehl.

(3) Giddings, RS, 69.

(4) Tiedeman, UCUS, 3-5.



### 1. Due Process of Law

The due process clause of the Fourteenth Amendment secures to all persons the democratic liberties as they come to be practiced in terms of freedom of speech, freedom of press, freedom of religious worship, and freedom of peaceable assembly for any lawful purpose.  
(1)

The right of free religious worship is a constitutional right belonging to all persons who are members of the American democracy. It is a constitutional right, enforceable in the courts. It allows every person "to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others."

In this country, the full and free right to entertain any religious belief, to practice or teach any religious principle or doctrine which does not violate the laws of morality and property, and which does not infringe personal rights is conceded to all. (2)

When any person undertakes to exercise his right of free religious worship in a way not deemed constitutionally permissible, such free exercise may be abridged or curtailed only by due process of law. Thus a person's right of free religious worship may be properly abridged if in the exercise

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(1) Hague v. C.I.O., 59 Sup Ct 954, (1939); Gitlow v. New York, 268 US 652; Whitney v. California, 274 US 357; Stromberg v. California, 283 US 359.

(2) Watson v. Jones, 13 Wallace 679, 728, (1872).



(1)

thereof, for example, he attempts to defraud others or  
(2)  
to practice polygamy.

The right of free speech and free press cannot be denied or abridged to any person except by due process of law. Due process of law, in such circumstances, is not invoked unless the person has himself violated his constitutional right. Due process of law is used to prevent wrongdoing and to enforce substantive rights. Freedom of speech and of press "does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public (3) morals or private reputation". When this occurs, the due process clause is invoked to curtail this kind of an exercise of these rights.

Due process requires all persons to obey the law. No person may seek to evade this duty by claiming some substantive right. Thus, when the N.L.R.B. ordered the Associated Press to restore employees discharged because of their union activities, the Associated Press could not successfully claim (4) that this order violated its right of freedom of the press.

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(1) New v. United States, 245 Fed. 710, (1917).

(2) Reynolds v. United States, 98 US 145, 163, (1879); David v. Beason, 133 US 333, 340, (1890), "Polygamy is a crime by the laws of all civilized and Christian countries; to call the advocacy of it a tenet of religion is to offend the common sense of mankind."

(3) Frohwerk v. United States, 249 US 204, (1919); Toledo Newspaper Co. v. U.S., 247 US 402, 419, (1918).

(4) Associated Press v. N.L.R.B., 301 US 103, 133, (1937).



The Fifth Amendment which requires that no person shall be deprived of life, liberty, or property without due process of law protects all persons within the United States from unjust, unreasonable and arbitrary treatment by the Federal Government. Thus when Congress attempted to stabilize the soft coal industry with the passage of the Bituminous Coal Conservation Act of 1935 which "authorized a specified majority of producers and miners to fix maximum hours and minimum wages within the several districts, compulsory upon the minority by virtue of the tax rebate to members of the coal code, and denial of government purchases", the Supreme Court decided that Congress was depriving certain persons thereby of personal liberty and private property without due process of law and that, therefore, this constituted an unconstitutional interference by Congress and was void. Congress cannot make any process due process. The Fourteenth Amendment forbids a State to deprive any person of life, liberty, or property, without due process of law.

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- (1) Wong Wing V. United States, 163 US 228, 238, (1896); but see Stoehr v. Wallace, 255 US 239, 245, (1921), "There is no constitutional prohibition against confiscation of enemy property."
  - (2) 49 Stat 991.
  - (3)  $13\frac{1}{2}\%$  of the 15% tax on coal at the mine.
  - (4) CUSA, 636.
  - (5) Carter v. Carter Coal Co., 298 US 238, 311, (1936).
  - (6) Hodges v. United States, 203 US 1, 14, (1906); Reinman v. Little Rock, 237 US 171, (1915); Nixon v. Herndon, 273 US 536, (1927); Civil Rights Cases, 109 US 3, (1883).



Due process of law refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. (1)

Due process of law protects against arbitrary or unreasonable conduct. (2)

The American constitutional conception of due process of law concerns itself with the rights of the "person". It provides that the Federal Government may not act beyond the scope of its delegated powers and it insists that no State exercise any power prohibited to it. (3) If either of these contingencies occurs, /a "person" suffers thereby, he may successfully oppose the enforcement of this law as being unconstitutional because it deprives him of his liberty or property without due process of law. (4)

Liberty thus guaranteed....denotes not merely freedom from bodily restraints, but also the right of the person to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a

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- (1) *Ex parte Kemmler*, 136 US 436, 448, (1890); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 US 157, (1917) held that the State defines rights in land and if State Courts hold such supposed rights to be non-existent, the 14th Amendment can afford no protection to rights which do not exist. *Fox River Paper Co. v. Railroad Commission*, 274 US 651, 657, (1927), *Missouri P. R. Co. v. Humes*, 115 US 512, 520, (1885).
  - (2) *Wolff Packing Co. v. Court of Industrial Relations*, 262 US 522, 534, (1923).
  - (3) *U.S. Constitution, Amendment X.*
  - (4) *Munn v. Illinois*, 94 US 113, 123-124, (1877).



home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit by free men. (1)

Other substantive rights so protected to the person are  
(2)

freedom of speech and of press and the right of peaceable  
(3) assembly. Yet, always, the principle Salus Populi est  
Suprema Lex prevails and therefore, for example, the legislature in the exercise of its discretion may provide for compulsory vaccination, or physical examination as a condition  
(4) precedent to marriage, in the exercise of its police power.

In dealing with the relations of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. (5)

But if the right of contract, which is a right of personal liberty, be struck down or arbitrarily interfered with, so that a person might not contract for personal employment

(1) Meyer v. Nebraska, 262 US 390, 399, (1923).

(2) Gitlow v. New York, 268 US 652, (1925).

(3) De Jonge v. Oregon, 299 US 353, 364, (1937). But see Waugh v. Univ. of Mississippi, 237 US 589, (1915). A statute condemning the display of a red flag as a sign, symbol or emblem of opposition to organized government, even though peaceful and orderly opposition by legal means, is unconstitutional. Stromberg v. California, 283 US 359, (1931).

(4) Jacobson v. Massachusetts, 197 US 11, (1905); Zucht v. King, 260 US 174, (1922).

(5) West Coast Hotel Co. v. Parrish, 300 US 379, (1937).



or other services which are exchanged for money or other forms of property, there is a substantial impairment of liberty in the long-established constitutional sense and there is a deprivation of liberty and property without due process of law. (1) Thus, Congress cannot make any process due process.

If the Federal or State authorities act within the scope of their authorization, then the "person" is entitled to due process in the application of the law. Many of the rights protected by the first eight amendments against national action are also protected from State infringement "not because they are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law and a denial of them (2) would be a denial of due process." These rights include (1) the right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, (2) the right to be informed of the nature and cause of the accusation, (3) the right not to be twice put in jeopardy of life or limb, (4) the right not to be compelled in a criminal case to be a witness against himself, (5) the right to a speedy and public trial by an impartial jury, (6) the right to be confronted with witnesses against him and to cross-examine them, (7) the right and opportunity to prepare a defence with assistance of counsel and to summon witnesses in

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(1) Coppage v. Kansas, 236 US 1, 14, (1915).

(2) Grosjean v. American Press Co., 297 US 233, (1936).



his favor, (8) the right to reasonable bail, (9) the right not to have an excessive fine or cruel and unusual punishment inflicted, (10) and the right to appeal a decision to a higher judicial court (including the right to a writ of habeus corpus, except in times of emergency).

Thus, the American Constitution, providing for a government of laws, safeguards to every person that the laws will be properly enforced, in substance and in procedure, to the end that no constitutional right of any person be abrogated without his consent. The guaranty of due process of law insures continued constitutional democracy.



### E. The Right of Revolution

#### 1. The Right to Participate in Government

(1)

"We, the people," a sovereign body, devised the American Constitution as a democratic instrumentality. The constitutional system of checks and balances is designed to protect the people against the oppression of the minority and  
(2) the tyranny of the majority even though unanimous consent  
(3) by all the people is seldom required. Democracy rarely demands unanimity; the "majority rule" is most frequently  
(4) used in democratic government. Thus majorities, minorities and pluralities are the means employed by "the people" in their "self-government". These groups are endowed with powers so that they may perform their duties. If groups are used in the scheme of government, then they must be given the right to participate in government. Therefore, this right belongs to all groups functioning as persons in American constitutional democracy.

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(1) Wait, RP, 4.

(2) Cong Rec, Aug. 4, 1937, 10607.

(3) Tufts, RBL, 391.

(4) See discussion supra.



## 2. The Right to Revolt

Is there a constitutional right to revolt? Are persons or groups accorded the right of revolution as one of those rights which accrue to them as members in a constitutional democracy? As it might be expected, authorities are divided in their views.

Some publicists reason that there is no right of revolution. In a constitutional democracy, it is claimed, "the people" convert their public servants into governors and render themselves subject to their legislation. Hence, rebellion can have no legal justification in a democracy; for this would be "an attempt at political suicide committed by a felonious minority".  
<sup>(1)</sup>

This reasoning, however, omits to consider that important circumstance in which the "governors" persist in governing despite the wishes of "the people". Do "the people" then have the right to revolt against their governors?

The distinguished authority, Emlin McClain, noted that "in a strict sense there are no rights recognized by the Law  
<sup>(2)</sup> except legal rights". Since, if there were a right of revolution it must exist outside the constituted order, he reasons, it cannot be said that there is a right of revolution. Further, the Constitution does not provide for this

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(1) Ordroneaux, C Leg US, 38.

(2) McClain, CLUD, 290.



(1)  
right.

The preponderance of authority, as well as the better  
(2)  
reasoning, affirms the right to revolt.

The "compact theory", the doctrine of indefeasible personal rights, the doctrine of constitutional limitations on government as a way of preventing occasions for dispute, and the doctrine of checks and balances which attempts to provide automatic machinery to prevent the encroachment on the rights of one group by the members of another group, writes Albert B. Hart, are all ideas based on the fundamental doctrine of revolution, that is, of the right of the governed to take arms if the impalpable restrictions on government are not  
(3)  
observed.

The Declaration of Independence proclaimed the right of revolution and undertook to justify its use in 1776.

The Declaration was not primarily concerned with the causes of this rebellion; its primary purpose was to present those causes in such a way as to furnish a moral and legal justification for that rebellion....Having formulated a philosophy of government that

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- (1) James M. Beck, TCUS, 203 writes that the words "ordain and establish" in the U. S. Constitution imply perpetuity. "They make no provision for the secession of any State, even if it deems itself aggrieved by federal action."
  - (2) Cooley, GPCL, 28. When a State is once in the Union, there is "no place for reconsideration or revocation, except through the consent of the States." Texas v. White, 7 Wallace 700, 726.
  - (3) Hart, AGAC, 36.



made revolution a right under certain conditions, they endeavored to show that these conditions prevailed.... (1)

Was this right subsequently defeated? It has never been repudiated by word or act. Indeed, if the annual Independence Day celebration on the fourth day of July has any significance, it is to reaffirm those principles incorporated in that document.

The right of revolution, says Mr. Justice Wilson, should be taught as a principle of the Constitution of the United States and of every state in the Union. (2)

The real question is when may this right be properly exercised. There are certain rights of so fundamental a character that "no free government may trespass upon them (3) whether they are enumerated in the Constitution or not." When these rights are infringed, the right of revolution may be exercised.

The Declaration of Independence was not, as it is often stated, "a declaration of the right to throw off an established (4) government and institute a new government in its place"; it was, in fact, the active insistence upon the rights of the established constitution.

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(1) Carl Becker, DI, 7, 16.

(2) Roscoe Pound, LM, 89.

(3) Corwin, CWMT, 113. "The course of our constitutional development has been to reduce fundamental rights to rights guaranteed by the sovereign." Calder v. Bull, 3 Dallas 386.

(4) McClain, CLUS, 290.



It is true that the colonists in the incipient period of the change planted themselves upon established rights, instead of seeking or desiring a revolution. Their purpose, therefore, was to maintain the old established principles of the Constitution instead of overturning them....it was the fact that the exercise of imperial power in the particulars complained of was tyrannical and in disregard of constitutional principles. (1)

The right of revolution is a social, not an anti-social, right. As such, it is properly exercised only with due regard for the rights of other persons.

The right of revolution may be said to exist when the government has become so oppressive that its evils decidedly overbalance those which are likely to attend the change, when success in the attempt is reasonably certain, and when such institutions are likely to result as will be satisfactory to the people. (2)

It is properly exercised only as a last resort.

(Declaration of Independence) asserts the right of revolution, when there is no other remedy. This does not mean the right to engage in insurrection and rebellion, when doomed to certain defeat, but it does mean that when the people are united, and find the government under which they are living intolerable, they have a right to revolt and establish a new government if they can. (3)

Thus, no group has a right to revolt except when the predetermined constitutional procedures for reaching a decision

(1) Thomas M. Cooley, GPCL, 25.

(2) Cooley, GPCL, 26; Chandler, GBFC, H. L. Carson, 20.  
"Revolutionists knew that rational liberty could only be secured through self-restraint; that the safety of the minority lay in curbing the wild impulses of the majority, and even that the well-being of the majority could only be secured by a government of checks and balances."

(3) Baker, FLAC, II, 673.



are denied to it. Conversely, when such procedures are denied, the right of revolution is assumed as a remedial procedure of last resort--the members of such group, however, assuming responsibility for their acts. Thus, the residual right of a community to revolt against the usurpation of powers constitutes its right to re-establish the American Constitutional system of law and order.



## CHAPTER IV

MAJORITY GROUP RIGHTS

"The voice of the people can only be heard when expressed in the times and under the conditions which they themselves have prescribed and pointed out by the constitution."<sup>(1)</sup> Thus, it is all "the people" who speak; the majority is simply an instrumentality which "the people" may use for this purpose in one instance, and may not use in another case.

The original idea of American elections was that everybody must get a clear majority. At present, almost everywhere in the United States, a plurality elects....<sup>(2)</sup>

(3)

A plurality, which always consists of a numerical minority of the whole group, functions in the prescribed instances in the same way as does the majority.

If American Democracy meant, and the American Constitution provided for, "the supremacy of the will of the numerical majority", as many authorities write, American Constitutional democracy would mean that the majority rules the minority.<sup>(4)</sup> If it could be proved that the majority does not

(1) Cooley, CL, 598.

(2) Hart, AGAC, 77.

(3) To the effect that the theory of the "concurrent majority" was rejected in favor of the theory of the "numerical majority", see Elliott, AGMR, 84.

(4) DeTocqueville, D in A, 324, "The very essence of democratic government consists in the absolute sovereignty of the majority; for there is nothing in the democratic states which is capable of resisting it". Elliott, AGMR, 144.



in truth rule, then, since somebody must rule somebody else, as postulated, the only remaining alternative would be that  
 (1) the minority rules the majority. Thus, constitutional democracy is conceived of as maintaining one or another form  
 (2) of despotism. This view of constitutional democracy is  
 (3) both short-sighted and incorrect. (See discussion supra)

Constitutionally speaking, "the people" have a right to  
 (4) do anything. This is not to say that the majority has a right to do anything.

The Supreme Court, an organ of government which interprets the Constitution and laws of Congress....may forbid the carrying out of the expressed will of the majority. It necessarily follows that the authority which can thus overrule the majority and enforce its own views of the system is an authority greater than the majority. (5)

The majority, as an entity with delegated powers, has defined rights which it may assert by virtue of its authority. As an entity with powers and rights, a majority is a person.

A majority taken collectively is only an individual, whose opinions, frequently whose interests, are opposed to those of another individual, who is styled a minority. If it be admitted that a man possessing absolute power may misuse that power...., why should

(1) Elliott, AGMR, 146.

(2) DeTocqueville, D in A, 340, "I attribute the small number of distinguished men in political life to the ever-increasing despotism of the majority in the United States.

(3) Cooley, CL, 598.

(4) DeTocqueville, D in A, 330.

(5) Smith, SAG, 296.



not a majority be liable to the same reproach? (1)

With other persons, the majority has a common and equal interest to promote and provide for the general welfare of the nation. (2) Therefore, it is endowed with the powers and rights common to all persons in the community. In addition, our constitutional democracy undertakes to make further use of the majority-groups under the theory that the only just principle of government amongst men, equally free, is that of popular sovereignty directed by the will of an intelligent majority. (3) Therefore, majority-groups were endowed, in certain defined circumstances, with additional powers and were given added rights. Let us now examine these rights.

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(1) DeTocqueville, D in A, 330.

(2) Wait, RP, 6.

(3) Ibid, 6.



### A. The Right to Determine Policy

Jefferson proclaimed the acceptance of the judgment of the majority as a rule of political justice to be one of the fundamentals of democracy. (1) Experience has proved the wisdom of this principle.

The equipping of a majority party with adequate power to impose its will upon a resisting minority makes....for practical responsibility. (2)

It is obvious, for example, that there should be a determination of the rules and limitations of debate on all questions up for consideration before a body. When all relevant arguments have been advanced, the debate ought to come to an end. But who is to say when this is the case? The American Constitution has given this right to the majority group. (3)

Where there is free discussion and free ballot, we think that the choice of the majority is, on the whole, the only practical way to settle any question. If the majority does not rule, then the minority rules. In the long run, the majority would seem to be more likely to be right, provided that matters have been thoroughly and fairly discussed. (4)

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- (1) Cleveland and Buck, BRG, 44-45. He described it as "acquiescence in the decisions of the majority."
  - (2) Willoughby and Rogers, IPG, 149; Chandler, GBFC, Compromises of the Constitution, R. Harrison, 294.
  - (3) Friedrich, CGP, 391; Willoughby and Rogers, IPG, 148-149.
  - (4) Tufts, RBL, 391.



Then again, since it is impossible that "the people" should consider and adopt their own laws, when a law has been perfected or when it is deemed desirable to take the expression of public sentiment upon any one question, Public <sup>(1)</sup> Opinion is once more expressed by the majority's vote.

Whether a majority should comprise a majority of those voting, a majority of the total membership of the whole body, a majority of a quorum, or whether more than a bare majority, and, if so, how much more, should be necessary to determine policy or formulate group judgment are matters which are determined in accordance with the importance of the issue, the custom of the community and the common sense of the people.

The Federal Constitution provides that

Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business. <sup>(2)</sup>

Here, the mere presence of a majority gives to each House the capacity to transact business. Since the Constitution does not prescribe any method of determining the presence of a majority, "it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact." <sup>(3)</sup> <sup>(4)</sup>

The House of Representatives has the exclusive power of impeachment by a majority vote, "that is, a majority of a

(1) Cooley, CL, 598.

(2) Art. I, sec. 5, cl. 1.

(3) CUSA, 113.

(4) U.S. v. Ballin, 144 US 1, 5-6, (1892).



(1) quorum," although no person may be convicted by the Senate on the impeachment "without the concurrence of two-thirds of the members present", viz, two-thirds of a quorum at least. (2) But to expel a member from either House, a majority of two-thirds is necessary. (3)

In enacting legislation, the bill under consideration must be concurred in by a constitutional majority which consists of a simple majority of a quorum, unless the constitution establishes some other rule. (4) The two-thirds vote of each House required to pass a bill over a veto means two-thirds of a quorum; (5) the term "House" refers to that body upon which legislative power is conferred by the Constitution, viz, a majority of the members. (6) Consequently, the contrary opinions and judgments voiced by such eminent authorities as De Tocqueville, Locke, Burlamaqui, Montesquieu, John Adams, Jefferson and Rousseau must be rejected when they hold that

- (1) Article I, sec. 2, cl. 5; Corwin, CWMT, 6. An impeachment is a charge of misconduct, and is comparable to an indictment by a grand jury.
- (2) Article I, sec. 3, cl. 6; Corwin, CWMT, 8.
- (3) Article I, sec. 5, cl. 2. A member may be expelled for treason, conspiracy against the Government, high misdemeanor. *In re Chapman*, 166 US 661, 669, (1897); CUSA, 114.
- (4) *Spangler v. Jacoby*, 14 Ill 297; *Supervisors of Schuyler Co. v. People*, 25 Ill 183; *Southworth v. P. and J. Rr. Co.*, 2 Mich 287; *State v. McBride*, 4 Mo 303; Cooley, CL, 2.
- (5) U.S. Constitution, Article I, sec. 7, cl. 2; Mass. Constitution, Part the Second, chap. I, Article II; Cooley, CL, 2.
- (6) CUSA, 120.
- (7) *Missouri P. R. Co. v. Kansas*, 248 US 276, (1919).



the majority has the whole power of the community naturally in them and may employ all that power in making laws. (1)

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- (1) Read, CR, Gaetano Salvemini, "The Concepts of Democracy and Liberty in the Eighteenth Century", 105; De Tocqueville, D in A, 336.



### 1. Right to Amend the Constitution

A constitution is in no proper sense the embodiment of the will of the people unless it recognizes the right of the majority to amend.... Constitutions which are really democratic contain such checks....as are calculated to insure the deliberate expression of the popular will. (1)

The American Constitution has been criticised, times too numerous to mention, as being an undemocratic constitution; that it protects "vested interests" from "the people"; that the majority cannot amend the constitution because the terms of amendment almost prohibit change in the two-thirds and three-fourths requirements (2) and because the powers of legislation by direct action of the people is impossible by its terms. It has also been charged that the Supreme Court has taken away from the majority in Congress the vestigial right to amend through legislation. Elihu Root has answered the latter charge when he pointed out that the difference between overriding the Constitution by a majority vote of Congress and amending the Constitution in accordance with the defined procedure is "the difference between breaking a rule (3) and making a rule".

An amendment to the Constitution of the United States can only be proposed by a two-thirds vote of the House and the Senate, or, by a convention called by Congress on the application of the legislatures of two-thirds of the

(1) Smith, SAG, 63.

(2) Ibid, 56, 61.

(3) Root, AGC, "Court and Majority Rule", 113-114.



(1) States. "Two-thirds of both houses" means two-thirds of  
 (2) a quorum of both houses. The proposed amendment can become a part of the constitution only "when ratified by the legislatures of three-fourths of the several states, or by  
 (3) conventions in three-fourths thereof". A proposed amendment may be ratified in no other way; not even by direct vote  
 (4) of "the people". The State legislatures or State Conventions, in ratifying the amendments, do not act as representatives of the States or of the population thereof;  
 (5) they act, *quoad hoc*, as federal agencies performing a specific function imposed upon them by Article V of the Constitution.  
 (6) The American constitutional conception of the majority's right to amend the constitution is not that any majority acting in any way, making its desires known, has the right to amend, but that predetermined majorities by conforming to the constitutional requirements do have the right to amend the constitution. In the observance of the

(1) Ransom, MRJ, 206.

(2) National Prohibition Cases, 253 US 350; CWMT, 87, "Legislatures" means legislative assemblies of the States and does not include their voters. Dillon v. Gloss, 256 US 368, (1921). That the President has no power to veto such proposals because this is not legislation, see Hollingsworth v. Virginia, 3 Dallas 378, (1798); CUSA, 555-556.

(3) U. S. Constitution, Article V.

(4) U. S. v. Sprague, 282 US 716, (1931). Congress determines upon which of the two modes of ratification will be pursued.

(5) Leser v. Garnett, 258 US 130, (1922); Smiley v. Holm, 285 US 355, (1932).

(6) Hawke v. Smith, 253 US 221, (1920); Corwin, CWMT, 88; CUSA, 557-8.



procedural formalities, not only are majorities' rights effectuated, but the rights of "the people" and the rights of minorities are likewise safeguarded. The exercise of the right to amend in any other way would be majority tyranny; it would lack the self-restraint essential to constitutional government. In fine, a majority simply because it is a majority does not have the right to change the constituted order. A majority has the right to amend the Constitution only if and when it conforms to the terms thereof--and not otherwise.



### B. Right to Select Representatives

The American Constitution provides machinery for the placing in authority, by the people, of representatives who will be able to give effect to the general will and who may be held responsible for the manner in which they execute this

(1) mandate. The selection of representatives involves two distinct procedures; the nomination of candidates, and the election, i.e., choosing between the aspiring nominees. In both cases, the usual procedure followed is the ballot vote by which the person receiving the largest number of votes is declared selected for the post. The constitutions of nearly all the States declare that the persons having the highest

(2)

number (a plurality) of votes is declared elected. Underlying this policy created in the interests of expediency is the principle that "the majorities must be secured the right

(3)

to nominate".

The evident purpose of a direct primary is to make the choice of candidates dependent upon the will of the numerical majority. The convention was introduced because the caucus had deprived the people of their freedom of choice and in course of time the convention became a cunningly devised instrument for securing a choice of candidates whose nomination was

(1) Willoughby and Rogers, IPG, 148.

(2) F. J. Stimson, LFSC, sec. 232, pp. 214-215. "A plurality of votes given at any election shall constitute a choice, where not otherwise directed in the Constitution." Authorities cited. Cooley, CL, 620, "Unless the law under which the election is held expressly requires more, a plurality of the votes cast will be sufficient."

(3) J. P. Quincy, PM, 59-63, 65.



(1)

dictated by the bosses of "the machine".

However, because of the usually large number of candidates for office and the expense, effort and time entailed in a second run-off election, it is customary when there is no majority to give to the largest plurality the powers and rights normally exercised by the majority. In some states, when there is no majority--or in case of a tie vote--provision is made for election either by the majority vote in the joint session of the legislature or in a second run-off election between the two candidates receiving the largest pluralities.

(2) The popular election, one of the fundamental principles of American constitutional democracy,

(3) is conducted on the principle that the majority of qualified electors have the right to select the candidate for office. The question involved in every case is

Was the party who has taken possession of the office the successful candidate at such election by having received a majority of the legal votes cast? (4)

(1) Elliott, AGMR, 113.

(2) F. J. Stimson, LFSC, 215. Cooley, CL, 614. Where, however, two offices of the same name were to be filled at the same election, but the notice of election specified one only, the political parties each nominated one candidate, and, assuming that but one was to be chosen, no elector voted for more than one, it was held that the one having a majority was alone chosen; the opposing candidate could not claim to be also elected, as having received the second highest number of votes, but as to the other officer there had been a failure to hold an election. (People v. Kent County Canvassers, 11 Mich. 111)

(3) Cleveland and Buck, BRG, 44.

(4) Cooley, CL, 625.



"I cannot avoid the conclusion," said Mr. Justice  
(1) Christiancy in People v. Cicotte, "that in theory and spirit our constitution and our statutes recognize as valid those votes only which are given by electors who possess the constitutional qualifications; that they recognize as valid such elections only as are effected by the votes of a majority of such qualified electors." An outstanding example of the necessity of constitutional qualification as a condition precedent to the majority's right to elect is found in the instance of election of President of the United States. The Twelfth Amendment stipulates

The Electors shall meet in their respective states and vote by ballot for President.... The person having the greatest number of votes for President shall be the President if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.

Here the States act as electors, "each state having one vote which is arrived at through votes of the representatives (2) elected by districts".

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(1) 16 Mich 311; Cooley, CL, 628-630.

(2) McPherson v. Blacker, 146 US 1, 26, (1892).



Here again the majority is given the right to say what the vote of the State shall be. To determine which way the State shall vote, the representatives from the several districts therein vote and the majority principle is invoked.

Therefore, it may be said that the constitutionally qualified majority has the right to determine questions of fundamental policy, to legislate, and to select representatives and executives to effectuate the general will.



## CHAPTER V

MINORITY GROUP RIGHTSA. Substantive Rights

Minority groups like other groups are devices which "the people" use for their self-government. Like majority groups, as minorities are endowed with certain powers they become "persons" sharing those rights which are common to all entities functioning as persons in the constitutional order. The American Constitution protects every person (individual and group) against the legislatures, and, in their natural or cardinal (i.e., substantive) rights, "minorities against majorities, even the individual against the mass."<sup>(1)</sup>

The American Constitution recognizes and protects the substantive rights of minority groups in several ways.

First, the Constitution places interdictions upon the Federal and State legislatures so that their substantive rights may not be impaired.<sup>(2)</sup> Thus, for example, the First Amendment to the Federal Constitution prohibits the Congress from making any law abridging the freedom of the press. The Constitution of the Commonwealth of Massachusetts granting full power and authority to the General Court "to make ordain and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions,

(1) Stimson, ACPPR, 18; Finer, TPMG, 69, "Minorities accept their situation on terms....not to be oppressed while in a condition of minority."

(2) Beck, TCUS, 206. "The great limitations of the Constitution forbid the majority or even the whole body of the



either with penalties or without; so as the same be not re-  
pugnant or contrary to this constitution," <sup>(1)</sup> declares that  
"The liberty of the press is essential to the security of  
freedom in a state; it ought not, therefore, to be restrained  
<sup>(2)</sup> in this commonwealth."

The Constitution of the United States and the constitutions of all the States contain certain positive inhibitions against governmental action which, although they accrue to the benefit of individuals as such, are politically significant because they constitute the great bulwarks of minorities.  
<sup>(3)</sup>

Second, it circumscribes the limits beyond which no constitutional majority may go in exercising its right to determine policy. One of the underlying principles upon which the American Constitution is based is "the protection of the minority....against the danger of the oppressions by majority rule."  
<sup>(4)</sup> Thus the Massachusetts Constitution provides, for instance, that the right of the freedom of press cannot

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House and Senate to pass laws either for want of authority or because they impair fundamental rights of individuals.."

(1) Part II, chap. I, sec. I, Article IV.

(2) Part I, Article XVI.

(3) Cleveland and Schafer, D in R, 449.

(4) Ibid, 448.

(5) C. G. Haines, RNLC, 82.



(1)

be the subject of an initiative or referendum petition. This is not to say that freedom of the press can never be limited. It would require a constitutional amendment, however, to do so.

No part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition; nor shall this section be the subject of such a petition. (2)

And third, it requires that every "person" in the community be tolerated in its constitutional right to exist.

....the Commonwealth must be founded upon purposes that may be held in common by all its peoples, not merely by those who belong to a privileged group.... In the United States national toleration is no less essential than religious toleration to the unity of the body politic. (3)

Permitting all the different groups to function within the law, the rights of minority groups are in little danger from an unjust combination of a majority. The degree of security depends on the number of interests.

In the extended republic of the United States and among the great variety of interests, parties, and sects which it embraces, a coalition of the majority of the whole society seldom can take place on any other principles than those of justice and the general good. (4)

Yet, no matter how extensively the substantive rights are guaranteed and protected, no matter how imperative their

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(1) Amendment XLVIII, II, sec. II, cl. 3.

(2) Ibid, cl. 4.

(3) Holcombe, FMC, 158-159.

(4) Fed., 356-358.



exercise, no rights are absolute.

There is no absolute right of free speech, no absolute right of free assembly. All constitutional rights must be exercised with due regard to the equal constitutional rights of other citizens. If assembly takes place, it must be a peaceable assembly, and it must be for a lawful purpose. Nor can any one insist upon the right to use public property if that right impairs an equal right to use of the same property for other citizens for other lawful purposes. (1)

The minority group's right to exist as a person necessarily implies that it is to exist as a free person. Therefore, it must have the right of self-determination. This is the right to regulate its own conduct, provided it "does not impair the rights or injure the well-being of its neighbor". (2) Thus, it must be free to protect its "person", property, reputation and must be at liberty to do those things for which it was created. The minority's right of self-determination requires that the majority abjure any tendency it may harbor to act in loco parentis.

The majority should not try to act as judge or conscience for the minority....in matters which, in reality, concern the minority alone. (3)

It is the right of the minority to participate in those affairs of government which concern its destiny.

A consequence of the foregoing is that the minority has

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(1) Rep. Pettengill, Cong Rec, May 20, 1938, 9510-9511; U.S. v. Cruikshank, 92 US 542; 12 Corpus Juris, 954, 955.

(2) Abbott, TRM, 250.

(3) Ibid, 249, 244-246.



the right to be represented in the councils of government. This is not to say that the minority has the right to determine policy.

For lack of a better method most matters in popularly controlled governments are determined by majorities.... The result....is that in each case in which a decision is arrived at, those in the minority appear to have their wishes wholly disregarded. They may constitute almost half of the electorate and yet, if the vote be for members of the legislature, obtain no representatives whatever in that body....a certain amount of minority representation is secured by dividing an area of considerable size into smaller electoral districts.... Thus opportunity is offered to those parties which may be in a minority....to elect representatives in these individual districts in which they may happen to be in a majority. (1)

The right of representation means the right to exercise influence through a smaller number acting in one's behalf. (2)

The minority has this right.

The minority is accorded representation.... in proportion to its numerical strength. In every committee, therefore, there are men representing both party views, and it sometimes happens that the arguments of the minority members are very influential in shaping reports made upon measures concerning which no sharp party lines have been drawn. (3)

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(1) Willoughby and Rogers, IPG, 171-172.

(2) Friedrich, CGP, 264.

(3) Cleveland, OD, 97.



### B. Procedural Rights

To serve as a device in democratic government, minority groups are endowed by the Constitution with certain rights which they are expected to exercise in the democratic procedure for arriving at group decisions.

Minority groups have the right to criticise the majority's program and administration.

One group should be in power trying to carry through its program, and the other should be in opposition, criticizing the majority and advancing alternative proposals. (1)

This right to criticise is not the right to obstruct. It is the right to scrutinize the majority's behavior and publicize its acts.

....the Yeas and Nays of the members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal. (2)

The purpose is "to insure publicity to the proceedings of the legislature, and a corresponding responsibility of the Members to their respective constituents". It is designed to compel each member to assume his due share of responsibility in legislation. (3) (4)

The minority has the right, too, to check the majority's acts. (5) The assumptions still prevail that this is a society

(1) Dimock, MPA, 115.

(2) U. S. Constitution, Article I, sec. 5, cl. 3.

(3) Field v. Clark, 143 US 649, 670, (1892); CUSA, 115.

(4) Cooley, CL, 140.

(5) Smith, SAG, 212.



of free men who govern themselves, that majorities as well as minorities are fallible, that no person should be oppressed, and that constitutional government gives security to the persons living under it by insisting upon restraint--  
 (1)  
 the self-restraint of the majority or checks by the minority.

It has been argued that to give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is, in its tendency, to subject the sense of the greater number to that of the  
 (2)  
 lesser. This view neglects to consider the sense of all the people that the constitutional processes are to prevail in all circumstances. It has also been asserted that

a very small percentage of American people can permanently thwart the will of an enormous majority....there can be no justification for such a condition on any possible theory of popular sovereignty. (3)

No justification, perhaps, except that no majority per se has the right to legislate on any matter except as all the people so constitutionally agree.

The minority can exercise its right to check the acts of the majority in its control of government (1) where more than a bare majority is necessary, by mustering enough votes to frustrate the majority's attempt to secure the designated

(1) CR, "Minority Rule and Constitutional Tradition," Max Lerner, 194. "The official theory assumes that a fundamental law must be superior to all legislative enactments."

(2) Fed, I, 145.

(3) Croly, PAL, 36.



majority, (2) by dilatory procedural tactics (e.g., filibustering, demanding roll call on the point that no quorum is present, preventing suspension of the rules to expedite matters near the close of a session),<sup>(1)</sup> and (3) by appeal to the courts to have enacted legislation declared unconstitutional.

The minority group has also the right to petition for a redress of grievances and the right to appeal for leadership.<sup>(2)</sup>

A minority that does not cry aloud almost to shrieking pitch, will not be heard for the roar of greater numbers.... A disunited minority is a nonentity; it has neither cohesion nor force nor available rights.<sup>(3)</sup>

The I. R. R. which theoretically enable the majority to govern because they furnish the means whereby any issue can readily be referred to a popular vote, are really expedients which minorities use to appeal to "the people" for leadership or to redress their grievances.

All of these direct government expedients may be set in motion by very small minorities. Where five, eight, ten, or even twenty-five percent of the voters possess the power by petition to force a popular vote, whether it be on a measure framed by them, or on a measure passed by the legislature, or on the removal of a public officer, they possess no

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(1) Cleveland and Schafer, DIR, 459.

(2) Read, CR, 202. *Lochner v. New York*, 198 US 45, (1905); *New State Ice Co. v. Liebmann*, 285 US 262, (1932), where people of Oklahoma wanted to restrict the number of ice plants; *Fletcher v. Peck*, 6 Cranch 87, (1810), where people of Georgia wanted to undo a corrupt grant of land.

(3) J. Rickaby, RM, 16.



small amount of political power. As a matter of plain truth they have more power to force action than is enjoyed by any but the most overwhelming legislative majorities. (1)

The minority usually exercises its right of Initiative and Referendum as an appeal to the people for a redress of grievances when it is unsuccessful with the legislature or  
(2)  
in the courts.

The minority invokes its right of Recall, especially in the case of elected officers, as an appeal for leadership in the community.  
(3)

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(1) Cleveland and Schafer, DIR, 460.

(2) Root, AGC, 110, 458; Ransom, MRJ, 10.

(3) Elliott, AGMR, 135.



### C. Minority Rights in Time of War

In a democracy, the minority groups must at all times be free to dissent from the majority will, "to protest in speech, to agitate and persuade, to conduct campaigns openly, and endeavor in all peaceful and lawful ways to detach individuals from the majority and win them to the support of a minority in the hope that thereby the minority may presently become the majority." <sup>(1)</sup> This is equally true in time of war as it is in time of peace. The American Constitution, with the single exception of providing that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it" <sup>(2)</sup> in no way indicates or allows that the rights of any person may be abridged in time of war. Minority groups, therefore, are entitled, constitutionally, to exercise all their rights in time of war.

Yet, much has been said, and even more written, to show that no matter what the theory concerning this may be, in fact minority groups do have many of their rights, especially free speech and free press, abridged and sometimes curtailed, <sup>(3)</sup> in time of war; and, therefore, it is argued, the American

(1) F. S. Giddings, RS, 75.

(2) U. S. Constitution, Article I, sec. 9, cl. 2.

(3) Z. Chafee, FS; R.H. Eliel, "Freedom of Speech: during and since the Civil War", 18 Am. Pol. Sci. Rev. 712, (1924); T. J. Norton, "Our Courts and Free Speech", 13 A.B.A. Journal 658, (1927); A.M. Cathcart, "Constitutional Freedom of Speech and of the Press", 21 A.B.A. Journal 595, (1935).



Constitution does not guarantee and secure to minority groups, in time of war, those rights which they enjoy in time of peace. Is this criticism justified?

In peace time, minority group rights do not extend to the practice of obstructionist tactics.

Open or disguised obstruction may not be tolerated. (1)

The exercise of all rights must be coordinated as far as possible to respond to the public, and not to private opinion. It is for that reason that all rights must be subservient to the police power of the state. A person may not, for example, exercise his right of free speech with impunity if he thereby commits slander, criminal libel or makes obscene or indecent remarks in public. The police power, however, may not be invoked under specious pretexts to abridge a person's constitutional right of free speech. (4)

States insure domestic tranquillity by imposing salutary restraints upon the conduct of refractory individuals and mobs. (5)

(1) Giddings, RS, 77.

(2) Holcombe, FMC, 434.

(3) Slaughter House Cases, 16 Wallace 36, (1873). "Private interests must be made subservient to the general interests of the community." MRJ, 74, "Neither in theory nor in fact is there foundation for the view that the due process clause or any other part of the constitution confers rights which a decisive majority may not limit, change or withhold in general or particular cases." Rathbone v. Wirth, 6 NY (AD) 277, 287, (1896).

(4) Commonwealth v. Nichols, 18 N.E. (Mass) (2) 166, (1938).

(5) Holcombe, FMC, 384.



Amongst other things, the American Constitution was established to provide for the common defense. Congress was given the power

To declare war.... To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions; To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States .... (1)

Thus, Congress is empowered to engage in war as one of the incidents in the conduct of affairs of state. When this occurs, the police power merges into the war power; but the same constitutional principles and rights persist.

The minority may still talk and it may continue to try to persuade people, but it may not engage in any activities which would induce other persons to break the law or which would obstruct the proper execution of decisions constitutionally developed. It was for that reason that the Espionage Act of 1917 was declared to be constitutional. The right of free speech, like all other rights, is a constitutional right arising out of the relations entered into between the members of the community. As such it may be exercised properly only in accordance with the terms prescribed by the Constitution. In wartime the nation,

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(1) U. S. Constitution, Article I, sec. 8, cl. 11, 15, 16.

(2) Holcombe, FMC, 339-340.

(3) Debs v. United States, 249 US 211, (1919), Frohwerk v. United States, 249 US 204, (1919).

(4) Op. cit.

(5) Op. cit.



ex necessitate, makes demands upon its members which it does not make in time of peace. The new demands create new relationships between the persons comprising "the people". These new relationships demand that the constitutional rights which persons have must now be exercised differently than they had been. The varied experiences which individual persons and minority groups obviously encounter in the exercise of their constitutional rights, therefore, is not due to the fact that these rights are suspended or abolished in war time or that the instituted procedures are different or that the American Bill of Rights becomes (1) inoperative, but rather that the manner in which such instituted rights may be exercised by any person to earn approbation is different. In other words, because wartime conditions are conditions of struggle for national existence, the exercise of procedural rights which would tend to impair the efficacy of group action must of necessity be modified.

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(1) In *Ex parte Milligan*, 4 Wallace 2, (1867), the Supreme Court held, unanimously, that the power to suspend the privilege of the writ of habeas corpus did not confer any right to try and convict a person under arrest, to whom the privilege of the writ was denied, except in accordance with due process of law.



## CHAPTER VI

SUMMARY

In no part of the widely variant field of Political Philosophy have greater inconsistencies of reasoning developed--in none of its meanderings has "democratic" dogma been more basely degraded to serve undemocratic exploitative ends--than in the voluminous literature which deals with the postulated "rights" of majorities and minorities. In these circumstances there is need for incisive analysis and concreteness of expression. The need for concreteness makes two initial demands: (1) that analysis and discussion be limited to a single system of laws; and (2) that the key-words used to classify data and interrelate concepts be clearly defined.

The first condition is met by limiting the discussion to the American system of laws.

Definitions follow:

Rights in a legal and constitutional sense are those attributes of personality with which free, self-determining units of the community--individuals, corporations, or other groups or things--become endowed. These attributes, called rights, accrue to "persons" by virtue of relations which are sanctioned by the recognized dominant or governing group within the community.

Natural rights do not exist in society, unless and except as the term be used to mean the attributes which



naturally accrue to constituent members of a self-determining group who as such have the right to participate in and/or share the benefits of the instituted or constitutional social processes. The "natural and inherent" rights of a "person" as a member of a majority group are social rights "inalienable" as long as this person maintains a participating membership in the constitutional group numerically adequate to make decisions. When, in the process of taking a division, the individual is not in the determining group, he automatically becomes a member of a minority group.

The relationship of major or minor carries with it no right or benefit other than that which accrues to the membership as a whole. Each has the right to think, to feel, to give expression to his thoughts and feelings and be recorded for or against any alternative formally presented. In either case the relation of major or minor is incidental to a pre-determined procedure established for the common welfare of all members alike.

Each plays the same role--voting; an expression of concurrence in or opposition to a specific proposal. This is not a "natural and inherent" right. It rests on a constituent agreement which is superior to the institution to which the procedure is applied--a rule of association adopted by the membership group to mark out the manner of reaching decisions with respect to assumed benefits and responsibilities that are to be commonly shared. The term inalienable



constitutional rights is one sadly abused in common parlance when applied to "majorities and minorities".

Rights, as has been said, are attributes of "persons". The term "persons" is used in this case to distinguish the constituent membership units of the community who have entered into and established the association to which this procedure applies. Human biological beings, as such, have no rights or duties or responsibilities. They are not, as such, constituent units of a community. As biological units, individuals and groups are "things". They become persons only if and when they have rights attributed to them in the fundamental agreement called the Constitution.

An outlaw is not a person. A dead man is a thing; but his estate is impersonated. Any entity, corporeal or incorporeal, which is recognized to have the capacity to enter into relations governed by the "Law of Persons" has rights determined by those sanctioned relations accordingly consummated. Consequently, only to the extent that groups (majorities or minorities) are endowed with attributes of personality through impersonation in the American system of laws governing one or another group of persons, may they be held to have rights--and in the American system the right relates to the democratic process of group self-determination.

Our Constitution embodies two conceptions of rights: fundamental substantive rights; and fundamental procedural rights. Fundamental substantive rights (e.g., those set up



in "the Bill of Rights") are recognized as superior to and sanctioned by the people as formulated in the Constitution. They are attributes of personality without which endowed powers cannot be exercised and which exist only as they are formulated and established as being superior to constitutional implementations. Fundamental procedural rights are part and parcel of or subject to the Constitution. They are those attributes of personality which emanate from the willed-relations entered into pursuant to the established law and which may be exercised properly by the person to whom they accrue only within the limits of the constitution. Thus, constitutional rights, both substantive and procedural, even as they may not be abridged or denied without due process of law, may not be exercised without restraint. The so-called "natural rights" are really those substantive rights which emanate from the relations existing between the governors and the governed; they are the rights which persons have against the usurpation of delegated powers by the agents of the community.

The American Constitution is conceived of as a covenant between two persons--the community (i.e., "the people") impersonated as sovereign and each individual member thereof impersonated as subject--to follow specified procedures when making decisions about questions of common interest, policies to be adopted, or action to be taken; and by the terms of which responsibilities may be established. Since this complex



pattern of social adaptation, regulation and control was intended to give efficacy to the American philosophy of life, viz., Democracy, its proper consideration must include those written and unwritten rules and principles of social procedure in accordance with which government becomes organized and operative and by which the people, living together in a community, govern themselves, through conference, concurrence and collaboration.

Majority and Minority are terms connoting an intra-group procedural relationship. The American Constitutional conception of a majority is that group of persons numbering more than one-half of the persons participating in a socially pre-determined, commonly accepted, institutional procedure for the purpose of reaching a group decision. This institutional procedure may specify that more than one-half of the total group membership or of a quorum is required. The essential principle which obtains in American democracy is that the procedure governing the process of political self-determination is fundamental; that it must be definite, and known in advance as the process which shall validate decisions--not for a majority or minority group, but for the whole community. The decision when made is for 100% of the membership; obedience to this decision by the whole membership is the assumed test of loyalty.

A minority denotes those persons acting in a group--for the purpose of recording dissent--whose numerical strength is



less than the numerical strength of the group which under the predetermined rule constitutes a majority. The term "plurality" refers to the largest minority--when under the instituted procedures a plurality is adequate for decision. Thus, it is evident that the meaning of the terms "majority" and "minority" has reference to numerical adequacy and inadequacy for reaching a decision under predetermined rules that govern the intra-group relationship. It is only when groups are impersonated as having an authoritative significance in the process of social evaluation that they come to have rights --and then only to the extent of and in accordance with the nature of the attributes of personality accorded to such entities.

Democracy recognizes the right of all persons to enter into associations. The American Constitution defines this right of association to mean the right of persons to organize into groups, as functional entities, to achieve socially approved ends through socially approved means. Since democracy conceives of groups as functioning units, and since its success does not depend upon any system of exploitation, the American Constitution provides that each group justify its existence through the service which it renders to the community. This means that the membership of the community and of each group within the community has a right to service from every association of persons, consistent with the nature of that group. To fulfill this obligation, the Constitution



accords to the members of every group the constituent right, as determined by the law governing that form of organization, to self-determination, the right to share in the control and management of the group, the right to hold the servants of the group responsible to them, and consequently, the right to give support/or to withhold support from the group leaders. The matter of majority and minority rights, therefore, resolves itself into the most expedient way of deciding whose leadership the constituent personnel will follow. This same matter of expediency is the root and the crux of the procedure which constitutes due process insofar as it is used to determine and express the will of the entire community in (1) deciding questions of policy--constitutional amendments, declarations of war, etc., (2) electing executives and representatives--presidents, governors, legislators, selectmen, etc., (3) legislation--referenda, resolutions, laws, etc.

Minority groups have the important right attributed to every citizen and no other right than that of exercising the function of informed critical agencies for the community. Concretely, they have the right to question or challenge the principles, policies and methods of the majority and other minority groups; the right to petition for a redress of grievances; and the right of appeal to the whole body for leadership. These rights are secured not alone by the Bill of Rights, but also by such procedural inventions as the Initiative, Referendum, Recall, Proportional Representation



and the opportunity to organize opposition in political forums and in the courts.

The American Constitution particularly protects members of minority groups in their rights to life, liberty, and property by securing to them through the written and unwritten provisions of the Federal and State Constitutions the substantive rights of freedom of conscience and religious worship, freedom to acquire property, freedom from unwarranted arrest and expropriation, freedom of expression (oral and written), the right to peaceable assembly and the right to due process of law (including the right to contract, i.e., the right to choose a vocation and the right to work). No member of any minority group--no person, irrespective of his membership in any group--may be deprived of any of these rights without due process of law. "Congress may not make any process 'due process'". Thus, these rights have been set forth as superior to the implementation of government by reason of the fact that the American Constitution has placed interdictions, as far as the abrogation of any of these guarantees is concerned, upon the whole community in its usual right to act as a sovereign body by adopting the will of the majority.

The foregoing necessarily implies that every group, whose methods and ends carry social approbation, has a right to exist; this means the right to function as a properly sanctioned and integrated unit in the social order. Neither



a majority nor a minority group, as such, has any right to exercise powers; it can only express concurrence or dissent as a means of reaching group decision with respect to proposed action to be taken by the whole community. Therefore, when a majority or minority group undertakes to deprive or to deny to any other group within the community the right to exist, it is itself acting beyond the limits of the instituted procedures, i.e., it is acting ultra vires, and therefore, because it thus renders a disservice, forfeits its own right to exist.

A seeming exception to the rule that no group has the right to exert force or duress upon any other group within the community is the instance of the politically-organized group instituted for the purpose of effectuating "the will of the people" by compelling conformity thereto in accordance with the instituted procedures. This is no real exception because this group is the only one which carries community sanction in the use of force within the defined limits of the American Constitution.

No group has a right to revolt except when the predetermined constitutional procedures for reaching a decision are denied to it. Conversely, when such procedures are denied, the right of revolution is assumed as a remedial procedure of last resort--the members of such group, however, assuming responsibility for their acts. Thus, the residual right of a community to revolt against the usurpation of de-



legated powers constitutes its right to re-establish the American Constitutional system of law and order.

In time of war, minority group members have neither fewer nor lesser rights than they have in time of peace; members of a majority group, likewise, do not have any more nor greater rights in one instance than in the other. The varied experiences which individual persons and minority groups obviously encounter in the exercise of the rights which are asserted to exist at all times is due, not to the fact that rights are suspended or abolished in war time or that the instituted procedures are different or that the American Bill of Rights becomes inoperative, but rather that the manner in which such instituted rights may be exercised by any person to earn approbation is different. In other words, because wartime conditions are conditions of struggle for national existence, the exercise of procedural rights which would tend to impair the efficacy of group action must of necessity be conditioned thereby.



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# THE AMERICAN CONSTITUTIONAL CONCEPTION OF MAJORITY AND MINORITY RIGHTS

The Abstract of a Dissertation

Submitted in partial fulfilment of the requirements for the degree of  
Doctor of Philosophy  
BOSTON UNIVERSITY GRADUATE SCHOOL

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In no part of the widely variant field of Political Philosophy have greater inconsistencies of reasoning developed—in none of its meanderings has “democratic” dogma been more basely degraded to serve undemocratic exploitative ends—than in the voluminous literature which deals with the postulated “rights” of majorities and minorities. In these circumstances there is need for incisive analysis and concreteness of expression. The need for concreteness makes two initial demands: (1) that analysis and discussion be limited to a single system of laws; and (2) that the key-words used to classify data and interrelate concepts be clearly defined.

The first condition is met by limiting the discussion to the American system of laws.

Definitions follow:

Rights in a legal and constitutional sense are those attributes of personality with which free, self-determining units of the community—individuals, corporations, or other groups or things—become endowed. These attributes, called rights, accrue to “persons” by virtue of relations which are sanctioned by the recognized dominant or governing group within the community.

Natural rights do not exist in society, unless and except as the term is used to mean the attributes which naturally accrue to constituent members of a self-determining group who as such have the right to participate in and/or share the benefits of the instituted or constitutional social processes. The “natural and inherent” rights of a “person” as a member of a majority group are social rights “inalienable” as long as this person maintains a participating membership in the constitutional group numerically adequate to make decisions. When, in the process of taking a division, the individual is not in the determining group, he automatically becomes a member of a minority group.

The relationship of major or minor carries with it no right or benefit other than that which accrues to the membership as a whole. Each has the right to think, to feel, to give expression to his thoughts and feelings and be recorded for or against any alternative formally presented. In either case the relation of major or minor is incidental to a predetermined procedure established for the common welfare of all members alike.

Each plays the same role—voting; an expression of concurrence in or opposition to a specific proposal. This is not a “natural and inherent” right. It rests on a constituent agreement which is superior to the institution to which the procedure is applied—a rule of association adopted by the membership group to mark out the manner of reaching decisions with respect to assumed benefits and responsibilities that are to be commonly shared. The term inalienable constitutional rights is one sadly abused in common parlance when applied to “majorities and minorities”.

Rights, as has been said, are attributes of “persons”. The term “persons” is used in this case to distinguish the constituent membership units of the community who have entered into and established the association to which this procedure applies. Human biological beings, as such, have no rights or duties or responsibilities. They are not, as such, constituent units of a community. As biological units, individuals and groups are “things”. They become persons only if and when they have rights attributed to them in the fundamental agreement called the Constitution.

An outlaw is not a person. A dead man is a thing; but his estate is impersonated. Any entity, corporeal or incorporeal, which is recognized to have the capacity to enter into relations governed by the "Law of Persons" has rights determined by those sanctioned relations accordingly consummated. Consequently, only to the extent that groups (majorities or minorities) are endowed with attributes of personality through impersonation in the American system of laws governing one or another group of persons, may they be held to have rights—and in the American system the right relates to the democratic process of group self-determination.

Our Constitution embodies two conceptions of rights: fundamental substantive rights; and fundamental procedural rights. Fundamental substantive rights (e.g., those set up in the "Bill of Rights") are recognized as superior to and sanctioned by the people as formulated in the Constitution. They are attributes of personality without which endowed powers cannot be exercised and which exist only as they are formulated and established as being superior to constitutional implementations. Fundamental procedural rights are part and parcel of or subject to the Constitution. They are those attributes of personality which emanate from the willed-relations entered into pursuant to the established law and which may be exercised properly by the person to whom they accrue only within the limits of the constitution. Thus, constitutional rights, both substantive and procedural, even as they may not be abridged or denied without due process of law, may not be exercised without restraint. The so-called "natural rights" are really those substantive rights which emanate from the relations existing between the governors and the governed; they are the rights which persons have against the usurpation of delegated powers by the agents of the community.

*The American Constitution* is conceived of as a covenant between two persons—the community (i.e., "the people") impersonated as sovereign and each individual member thereof impersonated as subject—to follow specified procedures when making decisions about questions of common interest, policies to be adopted, or action to be taken; and by the terms of which responsibilities may be established. Since this complex pattern of social adaptation, regulation, and control was intended to give efficacy to the American philosophy of life, viz., Democracy, its proper consideration must include those written and unwritten rules and principles of social procedure in accordance with which government becomes organized and operative and by which the people, living together in a community, govern themselves, through conference, concurrence, and collaboration.

*Majority* and *Minority* are terms connecting an intra-group procedural relationship. The American Constitutional conception of a majority is that group of persons numbering more than one-half of the persons participating in a socially pre-determined, commonly accepted, institutional procedure for the purpose of reaching a group decision. This institutional procedure may specify that more than one-half of the total group membership or of a quorum is required. The essential principle which obtains in American democracy is that the procedure governing the process of political self-determination is fundamental; that it must be definite, and known in advance as the process which shall validate decisions—not for a majority or minority group, but for the whole community. The decision when made is for 100% of the membership; obedience to this decision by the whole membership is the assumed test of loyalty.

A minority denotes those persons acting in a group—for the purpose of recording dissent—whose numerical strength is less than the numerical strength of the group which under the predetermined rule constitutes a majority. The term “plurality” refers to the largest minority—when under the instituted procedures a plurality is adequate for decision. Thus, it is evident that the meaning of the terms “majority” and “minority” has reference to numerical adequacy and inadequacy for reaching a decision under predetermined rules that govern the intra-group relationship. It is only when groups are impersonated as having an authoritative significance in the process of social evaluation that they come to have rights—and then only to the extent of and in accordance with the nature of the attributes of personality accorded to such entities.

Democracy recognizes the right of all persons to enter into associations. The American Constitution defines this right of association to mean the right of persons to organize into groups, as functional entities, to achieve socially approved ends through socially approved means. Since democracy conceives of groups as functioning units, and since its success does not depend upon any system of exploitation, the American Constitution provides that each group justify its existence through the service which it renders to the community. This means that the membership of the community and of each group within the community has a right to service from every association of persons, consistent with the nature of that group. To fulfill this obligation, the Constitution accords to the members of every group the constituent right, as determined by the law governing that form of organization, to self-determination, the right to share in the control and management of the group, the right to hold the servants of the group responsible to them, and consequently, the right to give support to or withhold support from the group leaders. The matter of majority and minority rights, therefore, resolves itself into the most expedient way of deciding whose leadership the constituent personnel will follow. This same matter of expediency is the root and the crux of the procedure which constitutes due process insofar as it is used to determine and express the will of the entire community in (1) deciding questions of policy—constitutional amendments, declarations of war, etc., (2) electing executives and representatives—presidents, governors, legislators, selectmen, etc., (3) legislation—referenda, resolutions, laws, etc.

Minority groups have the important right attributed to every citizen and no other right than that of exercising the function of informed critical agencies for the community. Concretely, they have the right to question or challenge the principles, policies, and methods of the majority and other minority groups; the right to petition for a redress of grievances; and the right of appeal to the whole body for leadership. These rights are secured not alone by the Bill of Rights, but also by such procedural inventions as the Initiative, Referendum, Recall, Proportional Representation, and the opportunity to organize opposition in political forums and in the courts.

The American Constitution particularly protects members of minority groups in their rights to life, liberty, and property by securing to them through the written and unwritten provisions of the Federal and State Constitutions the substantive rights of freedom of conscience and religious worship, freedom to acquire property, freedom from unwarranted arrest and expropriation, freedom of expression (oral and written), the right to peaceable assembly, and the right to due process of law (including the right to contract, i.e., the right

to choose a vocation and the right to work). No member of any minority group—no person, irrespective of his membership in any group—may be deprived of any of these rights without due process of law. "Congress may not make any process 'due process'". Thus, these rights have been set forth as superior to the implementation of government by reason of the fact that the American Constitution has placed interdictions, as far as the abrogation of any of these guaranties is concerned, upon the whole community in its usual right to act as a sovereign body by adopting the will of the majority.

The foregoing necessarily implies that every group, whose methods and ends carry social approbation, has a right to exist; this means the right to function as a properly sanctioned and integrated unit in the social order. Neither a majority nor a minority group, as such, has any right to exercise powers; it can only express concurrence or dissent as a means of reaching group decision with respect to proposed action to be taken by the whole community. Therefore, when a majority or minority group undertakes to deprive or to deny to any other group within the community the right to exist, it is itself acting beyond the limits of the instituted procedures, i.e., it is acting ultra vires, and therefore, because it thus renders a disservice, forfeits its own right to exist.

A seeming exception to the rule that no group has the right to exert force or duress upon any other group within the community is the instance of the politically-organized group instituted for the purpose of effectuating "the will of the people" by compelling conformity thereto in accordance with the instituted procedures. This is no real exception because this group is the only one which carries community sanction in the use of force within the defined limits of the American Constitution.

No group has a right to revolt except when the predetermined constitutional procedures for reaching a decision are denied to it. Conversely, when such procedures are denied, the right of revolution is assumed as a remedial procedure of last resort—the members of such group, however, assuming responsibility for their acts. Thus, the residual right of a community to revolt against the usurpation of delegated powers constitutes its right to re-establish the American Constitutional system of law and order.

In time of war, minority group members have neither fewer nor lesser rights than they have in time of peace; members of a majority group, likewise, do not have any more nor greater rights in one instance than in the other. The varied experiences which individual persons and minority groups obviously encounter in the exercise of the rights which are asserted to exist at all times is due, not to the fact that rights are suspended or abolished in war time or that the instituted procedures are different or that the American Bill of Rights becomes inoperative, but rather that the manner in which such instituted rights may be exercised by any person to earn approbation is different. In other words, because wartime conditions are conditions of struggle for national existence, the exercise of procedural rights which would tend to impair the efficacy of group action must of necessity be conditioned thereby.

Additional copies may be obtained on application to

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Born in Boston, Massachusetts on February 11, 1911. Was graduated from the Wendell Phillips Grammar School, 1924, and from the Boston English High School, 1928. Completed the pre-legal course at the Boston University College of Business Administration, 1930.

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